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**REPORTS OF CASES**  
**DETERMINED IN THE**  
**APPELLATE COURTS**  
**OF ILLINOIS**

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**WITH A DIRECTORY OF THE JUDICIARY OF THE STATE  
CORRECTED TO SEPTEMBER 19, 1916, AND ABSTRACTS  
OF CASES AS DESIGNATED BY THE COURTS  
UNDER ACT APPROVED JUNE 27, 1913,  
IN EFFECT JULY 1, 1913.**

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**VOL. CXCVI**  
**A. D. 1916.**

**LAST FILING DATE OF REPORTED CASES:**  
**FIRST DISTRICT, DECEMBER 22, 1915.**  
**SECOND DISTRICT, DECEMBER 27, 1915.**  
**FOURTH DISTRICT, DECEMBER 1, 1915.**

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**EDITED BY**  
**THE PUBLISHERS' EDITORIAL STAFF**

**CHICAGO**  
**CALLAGHAN & COMPANY**  
**1916**

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DEC 15 1916

# DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE OF ILLINOIS.

CORRECTED TO SEPTEMBER 19, 1916.

The judiciary department of the State of Illinois is composed of (1) the Supreme Court; (2) Appellate Courts; (3) Circuit Courts; (4) Courts of Cook County; (5) City Courts; (6) Municipal Court of Chicago; (7) County and Probate Courts.

## (1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mount Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one, comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

### REPORTER.

SAMUEL P. IRWIN.....Bloomington.

### JUSTICES.

*First District*—WARREN W. DUNCAN.....Marion.

*Second District*—WILLIAM M. FARMER.....Vandalia.

*Third District*—FRANK K. DUNN.....Charleston.

*Fourth District*—GEORGE A. COOKE.....Aledo.

*Fifth District*—CHARLES C. CRAIG.....Galesburg.

*Sixth District*—JAMES H. CARTWRIGHT.....Oregon.

*Seventh District*—ORRIN N. CARTER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Craig is the present Chief Justice.

### CLERK.

CHARLES W. VAIL, Chicago.

### LIBRARIAN.

RALPH H. WILKIN, Springfield.

**(2) APPELLATE COURTS.**

These Courts are held by the Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One clerk is elected in each district.

**REPORTERS.**

Reported by the publishers' editorial staff.

**FIRST DISTRICT.**

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—James S. McInerney, Michigan Blvd. Bldg., Chicago.

WM. H. MCSURELY, Presiding Justice, Michigan Blvd. Bldg., Chicago.

JESSE HOLDOM, Justice, Michigan Blvd. Bldg., Chicago.

WILLIAM E. DEVER,\* Justice, Michigan Blvd. Bldg., Chicago.

**FIRST BRANCH.\*\***

ALBERT C. BARNES, Presiding Justice, Michigan Blvd. Bldg., Chicago.

JOHN P. MCGOORTY, Justice, Michigan Blvd. Bldg., Chicago.

CHARLES A. McDONALD, Justice, Michigan Blvd. Bldg., Chicago.

**SECOND BRANCH.\*\*\***

JOHN M. O'CONNOR, Presiding Justice, Michigan Blvd. Bldg., Chicago.

CLARENCE N. GOODWIN, Justice, Michigan Blvd. Bldg., Chicago.

THOMAS TAYLOR, Justice, Michigan Blvd. Bldg., Chicago.

**SECOND DISTRICT.**

Composed of the counties of Boone, Bureau, Carroll, DeKalb, DuPage, Grundy, Henderson, Henry, Iroquois, Jo Daviess, Kane, Kankakee, Kendall, Knox, Lake, La Salle, Lee, Livingston, Marshall, McHenry, Mercer, Ogle, Peoria, Putnam, Rock Island, Stark, Stephenson, Warren, Whiteside, Will, Winnebago and Woodford.

Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.

CLERK—Christopher C. Duffy, Ottawa.

DORRANCE DIBELL, Presiding Justice, Joliet.

DUANE J. CARNES, Justice, Sycamore.

JOHN M. NIEHAUS, Justice, Peoria.

\* Appointed October 11, 1916.

\*\* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1897. Hurd's Statutes, 1897, 508, Laws of 1897, 185, J. & A. ¶2981.

\*\*\* Established under act of June 6, 1911, J. & A. ¶2989.



**THIRD DISTRICT.**

Composed of the counties of Adams, Brown, Calhoun, Cass, Champaign, Christian, Clark, Coles, Cumberland, DeWitt, Douglas, Edgar, Ford, Fulton, Greene, Hancock, Jersey, Logan, Macon, Macoupin, Mason, McDonough, McLean, Menard, Montgomery, Morgan, Moultrie, Platt, Pike, Sangamon, Schuyler, Scott, Shelby, Tazewell and Vermilion.

Court sits at Springfield, Sangamon county, on the first Tuesdays in April and October.

**CLERK**—George L. Tipton, Springfield.

**EDGAR ELDREDGE**, Presiding Justice, Ottawa.

**EMERY C. GRAVES**, Justice, Geneseo.

**GEORGE W. THOMPSON**, Justice, Galesburg.

**FOURTH DISTRICT.**

Composed of the counties of Alexander, Bond, Clay, Clinton, Crawford, Edwards, Effingham, Fayette, Franklin, Gallatin, Hamilton, Hardin, Jackson, Jasper, Jefferson, Johnson, Lawrence, Madison, Marion, Massac, Monroe, Perry, Pope, Pulaski, Randolph, Richland, Saline, St. Clair, Union, Wabash, Washington, Wayne, White and Williamson.

Court sits at Mount Vernon, Jefferson County, on the fourth Tuesdays in March and October.

**CLERK**—Charles C. Johnson, Mount Vernon.

**HARRY HIGBEE**, Presiding Justice, Pittsfield.

**JAMES C. MCBRIDE**, Justice, Taylorville.

**FRANKLIN H. BOGGS**, Justice, Urbana.

**(3) CIRCUIT COURTS.**

Exclusive of Cook County, the State of Illinois is divided into seventeen judicial circuits, as follows: \*

**FIRST CIRCUIT.**

The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

**Judges:** A. W. LEWIS, Harrisburg.

DEWITT T. HARTWELL, Marion.

WILLIAM N. BUTLER, Cairo.

**SECOND CIRCUIT.**

The Counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

**Judges:** J. C. EAGLETON, Robinson.

JULIUS C. KERN, Carmi.

CHARLES H. MILLER, Benton.

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\* Laws 1897. 188, J. & A. 13070.

**THIRD CIRCUIT.**

The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

Judges: LOUIS BERNREUTER, Nashville.  
GEORGE A. CROW, East St. Louis.  
J. F. GILLHAM, Edwardsville.

**FOURTH CIRCUIT.**

The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

Judges: WM. B. WRIGHT, Effingham.  
JAMES C. McBRIDE, Taylorville.  
THOMAS M. JETT, Hillsboro.

**FIFTH CIRCUIT.**

The counties of Vermillion, Edgar, Clark, Cumberland and Coles.

Judges: JOHN H. MARSHALL, Charleston.  
WALTER BREWER, Toledo.  
AUGUSTUS A. PARTLOW, Danville.

**SIXTH CIRCUIT.**

The counties of Champaign, Douglas, Moultrie, Macon, DeWitt and Platt.

Judges: GEO. A. SENTEL, Sullivan.  
WM. K. WHITFIELD, Decatur.  
FRANKLIN H. BOGGS, Urbana.

**SEVENTH CIRCUIT.**

The counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey.

Judges: JAMES A. CREIGHTON, Springfield.  
FRANK W. BURTON, Carlinville.  
NORMAN L. JONES, Carrollton.

**EIGHTH CIRCUIT.**

The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

Judges: HARRY HIGBEE, Pittsfield.  
ALBERT AKERS, Quincy.  
GUY R. WILLIAMS, Havana.

**NINTH CIRCUIT.**

The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

Judges: GEORGE W. THOMPSON, Galesburg.  
HARRY M. WAGGONER, Macomb.  
ROBERT J. GRIER, Monmouth.

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**TENTH CIRCUIT.**

**The counties of Peoria, Marshall, Putnam, Stark and Tazewell.**

**Judges. JOHN M. NIEHAUS, Peoria.**

**THEODORE N. GREEN, Pekin.**

**CLYDE E. STONE, Peoria.**

**ELEVENTH CIRCUIT.**

**The counties of McLean, Livingston, Logan, Ford and Woodford.**

**Judges: SAIN WELTY, Bloomington.**

**GEORGE W. PATTON, Pontiac.**

**THOMAS M. HARRIS, Lincoln.**

**TWELFTH CIRCUIT.**

**The counties of Will, Kankakee and Iroquois.**

**Judges: DOBRANCE DIBELL, Joliet.**

**ARTHUR W. DESELM, Kankakee.**

**FRANK L. HOOPER, Watseka.**

**THIRTEENTH CIRCUIT.**

**The counties of Bureau, La Salle and Grundy.**

**Judges: SAMUEL C. STOUGH, Morris.**

**JOE A. DAVIS, Princeton.**

**EDGAR ELDREDGE, Ottawa.**

**FOURTEENTH CIRCUIT.**

**The counties of Rock Island, Mercer, Whiteside and Henry.**

**Judges: WILLIAM T. CHURCH, Aledo.**

**FRANK D. RAMSAY, Morrison.**

**EMERY C. GRAVES, Geneseo.**

**FIFTEENTH CIRCUIT.**

**The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.**

**Judges: RICHARD S. FARRAND, Dixon.**

**JAMES S. BAUME, Galena.**

**OSCAR E. HEARD, Freeport.**

**SIXTEENTH CIRCUIT.**

**The counties of Kane, Du Page, De Kalb and Kendall.**

**Judges: CLINTON F. IRWIN, Elgin.**

**DUANE J. CARNES, Sycamore.**

**MAZZINI SLUSSEB, Wheaton.**

**SEVENTEENTH CIRCUIT.**

**The counties of Winnebago, Boone, McHenry and Lake.**

**Judges: ARTHUR H. FROST, Rockford.**

**CHARLES H. DONNELLY, Woodstock.**

**CLAIRE C. EDWARDS, Waukegan.**

## (4) COURTS OF COOK COUNTY.

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The State Constitution recognizes Cook county as one judicial circuit and establishes the Circuit, Criminal and Superior Courts of said county. The Criminal Court has the jurisdiction of a Circuit Court in criminal and quasi-criminal cases only, and the judges of the Circuit and Superior Courts are judges, ex-officio, of the Criminal Court.

### CRIMINAL COURT.

CLERK—FRANK J. WALSH, Criminal Court Building, Chicago.

### CIRCUIT COURT.

CLERK—JOHN W. RAINEY, County Building, Chicago.

#### JUDGES.

RICHARD S. TUTHILL,  
JESSE A. BALDWIN,  
FRANK BAKER,\*  
KICKHAM SCANLAN,  
THOMAS G. WINDES,  
MERRITT W. PINCKNEY,  
JESSE HOLDOM,  
VICTOR P. ARNOLD,  
DAVID M. BROTHERS,  
CHAS. M. THOMSON,

DAVID F. MATCHETT,  
JOHN GIBBONS,  
LOCKWOOD HONORE,  
GEORGE KERSTEN,  
JOHN P. MCGOERTY,  
FREDERICK A. SMITH,  
CHARLES M. WALKER,  
GEO. F. BARRETT,  
THOMAS TAYLOR, JR.,  
OSCAR M. TORRISON.

### SUPERIOR COURT.

CLERK—RICHARD J. McGRATH, County Building, Chicago.

#### JUDGES.

WILLIAM H. MCSURELY,  
JOHN M. O'CONNOR,  
THEODORE BRENTANO,  
JOSEPH SABATH,  
ROBERT E. TURNEY,  
WILLIAM FENIMORE COOPER,  
WILLIAM E. DEVER,  
MARTIN M. GRIDLEY,  
CHARLES A. McDONALD,

MARCUS A. KAVANAGH,  
JOSEPH H. FITCH,  
HENRY V. FREEMAN,  
ALBERT C. BARNES,  
HUGO PAM,  
M. L. MCKINLEY,  
CLARENCE N. GOODWIN,  
CHARLES M. FOELL,  
DENIS E. SULLIVAN.

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\* Died July 9, 1916.

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**(5) CITY COURTS.**

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City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 37, R. S., J. & A. § 3309, and when so established have jurisdiction as defined by Sec. 1 of an act entitled "An Act in relation to courts of record in cities," approved May 10, 1901, J. & A. § 3289.

**THE CITY COURT OF ALTON.**

**JAMES E. DUNNEGAN, Judge.**      **ALLAN G. MACDONALD, Clerk.**

**THE CITY COURT OF AURORA.**

**EDWARD M. MANGAN, Judge.**      **W. C. FLANNIGAN, Clerk.**

**THE CITY COURT OF BEARDSTOWN.**

**J. J. COOKE, Judge.**      **JOHN LISTMANN, Clerk.**

**THE CITY COURT OF BENTON.**

**R. E. HICKMAN, Judge.**      **LORAN MORGAN, Clerk.**

**THE CITY COURT OF CANTON.**

**H. C. MORAN, Judge.**      **A. C. SHIPLEY, Clerk.**

**THE CITY COURT OF CARBONDALE.**

**HERBERT A. HAYS, Judge.**      **DALLAS MEISENHEIMER, Clerk.**

**THE CITY COURT OF CENTRALIA.**

**ALBERT D. RODENBERG, Judge.**      **GUY C. LIVESAY, Clerk.**

**THE CITY COURT OF CHARLESTON.**

**CHARLES A. QUACKENBUSH, Judge.**      **EORA DANIELS, Clerk.**

**THE CITY COURT OF CHICAGO HEIGHTS.**

**CHARLES H. BOWLES, Judge.**      **EDWARD H. KIRGIS, Clerk.**

**THE CITY COURT OF DE KALB.**

**HARRY W. McEWEN, Judge.**      **JOHN C. KILLIAN, Clerk.**

**THE CITY COURT OF DU QUOIN.**

**BENJAMIN W. POPE, Judge.**      **HARRY BARRETT, Clerk.**

**THE CITY COURT OF EAST ST. LOUIS.**

**H. L. BROWNING,**      **WILLIAM J. VEACH, Clerk.**  
**W. M. VANDEVENTER, Judges.**

**THE CITY COURT OF ELGIN.**

**FRANK E. SHOPEN, Judge.**      **CHARLES S. MOTE, Clerk.**

**THE CITY COURT OF GRANITE CITY.**

**M. R. SULLIVAN, Judge.**      **JACK MELLON, Clerk.**

**THE CITY COURT OF HARRISBURG.**

**WM. H. PARISH, JR., Judge.**      **HOMER WADE, Clerk.**

**THE CITY COURT OF HERRIN.**

**ROBERT T. COOK, Judge.**      **ANNA DALE, Clerk.**

# **MUNICIPAL COURT OF CHICAGO.**

## **THE CITY COURT OF JOHNSTON CITY.**

**J. H. CLAYTON, Judge. J. E. SULLINS, Clerk.**

## **THE CITY COURT OF KEWANEE.**

**H. STERLING POMEROY, Judge. CHARLES L. ROWLEY, Clerk.**

## **THE CITY COURT OF LITCHFIELD.**

**DAN W. MADDOX, Judge. LAURETTA SALZMAN, Clerk.**

## **THE CITY COURT OF MACOMB.**

**JOSIE WESTFALL, Judge. WM. B. MARTIN, Clerk.**

## **THE CITY COURT OF MARION.**

**W. O. POTTER, Judge. GEO. T. CARTER, Clerk.**

## **THE CITY COURT OF MATTOON.**

**JOHN McNUTT, Judge. THOMAS M. LYTTLE, Clerk.**

## **THE CITY COURT OF MOLINE.**

**G. O. DIETZ, Judge. GEO. A. SCHRADER, Clerk.**

## **THE CITY COURT OF PANA.**

**J. H. FORNOFF, Judge. G. W. MARSLAND, Clerk.**

## **THE CITY COURT OF SPRING VALLEY.**

**WILLIAM H. HAWTHORNE, Judge. PETER ROLANDE, Clerk.**

## **THE CITY COURT OF STERLING.**

**CARL E. SHELDON, Judge. EARL L. HESS, Clerk.**

## **THE CITY COURT OF WEST FRANKFORT.**

**H. R. DIAL, Judge. PEARL BEATTIE, Clerk.**

## **THE CITY COURT OF ZION CITY.**

**V. V. BARNES, Judge. O. L. SPRECHER, Clerk.**

## **(6) MUNICIPAL COURT OF CHICAGO**

Established by Act of May 18, 1905 (L. 1905, p. 158), J. & A. §§ 3313 *et seq.*

**FRANK P. DANISCH, Clerk.**

**CHIEF JUSTICE.**

**HARRY OLSON.**

### **ASSOCIATE JUDGES.**

**HARRY M. FISHER**

**EDWARD T. WADE**

**JOHN K. PRINDIVILLE**

**JOSEPH P. RAFFERTY**

**JOHN COURTNEY**

**JOHN J. SULLIVAN**

**JOHN A. MAHONEY**

**WILLIAM N. GEMMILL**

**FRANK H. GRAHAM**

**DAVID SULLIVAN**

**HUGH J. KEARNS**

**JOSEPH S. LABUY**

**JOHN R. NEWCOMER**

**JOHN R. CAVERLY**

**CHAS. A. WILLIAMS**

**JACOB H. HOPKINS**

**HARRY P. DOLAN**

**J. W. BECKWITH**

**JAMES C. MARTIN**

**ARNOLD HEAP**

**JOHN J. ROONEY**

**SAMUEL H. TEUDE**

**LEO DOYLE**

**EDMUND K. JARECKI**

**CHARLES N. GOODNOW**

**PATRICK B. FLANAGAN**

**DENNIS W. SULLIVAN**

**SHERIDAN E. FREY**

**JOHN STELK**

**JOSEPH Z. UHLIR**

**HOSEA W. WELLS**

## (7) COUNTY AND PROBATE COURTS.

### TOPICAL INDEX.

In the counties of Cook, Kane, La Salle, Madison, Peoria, Rock Island, Sangamon, St. Clair, Vermillion and Will, each having a population of over 70,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate. (Laws 1881, 72), J. & A. § 3259.

JUDGES.	COUNTIES.	COUNTY SEATS.
LYMAN McCABE.....	Adams .....	Quincy.
MILES F. GILBERT.....	Alexander .....	Cairo.
WM. H. DAWDY.....	Bond .....	Greenville.
WM. C. DE WOLF.....	Boone .....	Belvidere.
WILLARD Y. BAKER.....	Brown .....	Mt. Sterling.
JAMES R. PRICHARD.....	Bureau .....	Princeton.
JOHN DAY, JR.....	Calhoun .....	Hardin.
ARTHUR J. GRAY.....	Carroll .....	Mt. Carroll.
CHARLES Æ. MARTIN.....	Cass .....	Virginia.
ROY C. FREEMAN.....	Champaign .....	Urbana.
CHARLES A. PRATER.....	Christian .....	Taylorville.
A. L. RUFFNER.....	Clark .....	Marshall.
JOHN L. BOYLES.....	Clay .....	Louisville.
JAMES ALLEN .....	Clinton .....	Carlyle.
JOHN P. HARBAH.....	Coles .....	Charleston.
THOMAS F. SCULLY.....	Cook .....	Chicago.
HENRY HORNER, PRO. J.....	Cook .....	Chicago.
DUANE GAINES .....	Crawford .....	Robinson.
STEPHEN B. RARIDEN.....	Cumberland .....	Toledo.
WILLIAM L. POND.....	DeKalb .....	Sycamore.
FRED C. HILL.....	DeWitt .....	Clinton.
D. H. WAMSLEY.....	Douglas .....	Tuscola.
S. L. RATHJE.....	DuPage .....	Wheaton.
DANIEL V. DAYTON.....	Edgar .....	Paris.
PETER C. WALTERS.....	Edwards .....	Albion.
BARNEY OVERBECK.....	Effingham .....	Effingham.
JEROME G. WILLS.....	Fayette .....	Vandalia.
M. L. McQUISTON.....	Ford .....	Paxton.
NEALY I. GLENN.....	Franklin .....	Benton.
ROBERT S. BOYD.....	Fulton .....	Lewistown.
GEORGE L. HOUSTON.....	Gallatin .....	Shawneetown.
THOMAS HENSHAW.....	Greene .....	Carrollton.
GEORGE BEDFORD.....	Grundy .....	Morris.
J. S. SNEED.....	Hamilton .....	McLeansboro.
E. W. DUNHAM.....	Hancock .....	Carthage.



JUDGES.	COUNTIES.	COUNTY SEATS.
ARTHUR A. MILES.....	Hardin .....	Elizabethtown.
RUFUS F. ROBINSON.....	Henderson .....	Oquawka.
LEONARD E. TELLEEN.....	Henry .....	Cambridge.
JOHN H. GILLAN.....	Iroquois .....	Watseka.
WILLARD F. ELLIS.....	Jackson .....	Murphysboro.
HARRY C. DAVIDSON.....	Jasper .....	Newton.
ANDREW D. WEBB.....	Jefferson .....	Mt. Vernon.
HARRY W. POGUE.....	Jersey .....	Jerseyville.
F. J. CAMPBELL.....	Jo Daviess.....	Galena.
J. F. HIGHT.....	Johnson .....	Vienna.
S. N. HOOVER.....	Kane .....	Geneva.
JOHN H. WILLIAMS, Pro. J....	Kane .....	Geneva.
JAY H. MERRILL.....	Kankakee .....	Kankakee.
CLARENCE S. WILLIAMS.....	Kendall .....	Galesburg.
R. C. RICE.....	Knox .....	Yorkville.
PERRY L. PERSONS.....	Lake .....	Waukegan.
HENRY MAYO.....	La Salle .....	Ottawa.
ALBERT T. LARDIN, Pro. J....	La Salle .....	Ottawa.
OTTO W. LONGNECKER.....	Lawrence .....	Lawrenceville.
JOHN B. CRABTREE.....	Lee .....	Dixon.
B. R. THOMPSON.....	Livingston .....	Pontiac.
CHARLES J. GEHLBACH.....	Logan .....	Lincoln.
JOHN H. MCCOY.....	Macon .....	Decatur.
ANDREW J. DUGGAN.....	Macoupin .....	Carlinville.
H. B. EATON.....	Madison .....	Edwardsville.
JOSEPH P. STREUBER, Pro. J....	Madison .....	Edwardsville.
WILLIAM G. WILSON.....	Marion .....	Salem.
DANIEL H. GREGG.....	Marshall .....	Lacon.
JAMES A. MCCOMAS.....	Mason .....	Havana.
LANNES P. OAKES.....	Massac .....	Metropolis.
CHARLES I. IMES.....	McDonough .....	Macomb.
DAVID T. SMILEY.....	McHenry .....	Woodstock.
JAMES C. RILEY.....	McLean .....	Bloomington.
JESSE M. OTT.....	Menard .....	Petersburg.
F. L. CHURCH.....	Mercer .....	Aledo.
HENRY SCHNEIDER.....	Monroe .....	Waterloo.
J. T. McDAVID.....	Montgomery .....	Hillsboro.
WM. E. THOMSON.....	Morgan .....	Jacksonville.
JOHN T. GRIDER.....	Moultrie .....	Sullivan.
FRANK E. REED.....	Ogle .....	Oregon.
CHESTER F. BARNETT.....	Peoria .....	Peoria.
WALTER A. CLINCH, Pro. J....	Peoria .....	Peoria.
LOUIS R. KELLY.....	Perry .....	Pinckneyville.
WM. A. DOSS.....	Platt .....	Monticello.
PAUL F. GROTE.....	Pike .....	Pittsfield.
BENJ. F. ANDERSON.....	Pope .....	Golconda.

JUDGES.	COUNTIES.	COUNTY SEATS.
FRED HOOD.....	Pulaski .....	Mound City.
IRVING E. BROADDUS.....	Putnam .....	Hennepin.
WM. M. SHUWERK.....	Randolph .....	Chester.
ROBT. B. WITCHER.....	Richland .....	Olney.
NELS A. LABSON.....	Rock Island.....	Rock Island.
BENJ. S. BELL, Pro. J.....	Rock Island.....	Rock Island.
CHAS. D. STILWELL.....	Saline .....	Harrisburg.
JOHN B. WEAVER.....	Sangamon .....	Springfield.
C. H. JENKINS, Pro. J.....	Sangamon .....	Springfield.
JOHN C. WORK.....	Schuyler .....	Rushville.
F. C. FUNK.....	Scott .....	Winchester.
A. J. STEIDLEY.....	Shelby .....	Shelbyville.
FRANK THOMAS.....	Stark .....	Toulon.
JOSEPH B. MESSICK.....	St. Clair.....	Belleville.
FRANK PERRIN, Pro. J.....	St. Clair.....	Belleville.
ROSCOE J. CARNAHAN.....	Stephenson .....	Freeport.
JAMES M. RAHN.....	Tazewell .....	Pekin.
MONROE C. CRAWFORD.....	Union .....	Jonesboro.
LAWRENCE T. ALLEN.....	Vermillion .....	Danville.
W. J. BOOKWALTER, Pro. J....	Vermillion .....	Danville.
W. S. WILLHITE.....	Wabash .....	Mt. Carmel.
L. E. MURPHY.....	Warren .....	Monmouth.
W. P. GREEN.....	Washington .....	Nashville.
J. V. HEIDINGER.....	Wayne .....	Fairfield.
J. M. ENDICOTT.....	White .....	Carmi.
WM. A. BLODGETT.....	Whiteside .....	Morrison.
GEORGE J. COWING.....	Will .....	Joliet.
JOHN B. FITHIAN, Pro. J.....	Will .....	Joliet.
W. F. SLATER.....	Williamson .....	Marion.
LOUIS M. RECKHOW.....	Winnebago .....	Rockford.
ARTHUR C. FORT.....	Woodford .....	Eureka.

## APPELLATE COURT CASES PASSED ON BY THE SUPREME COURT

As reviewed by the Supreme Court, showing the result of such review, whether affirmed, modified, dismissed or reversed, with references to the reports where such cases may be found. Table also shows cases in which certiorari has been applied for and denied, thus rendering the decision of the Appellate Court final. (See Sec. 121 Practice Act, J. & A. ¶ 8658.)

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**Stud Farm** .....193 Ill. App. 598

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**son** .....194 Ill. App. 491

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**Bartelmann Co. ads. Christensen**....195 Ill. App. 232

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**Malting Co. v. Modzelewski et al.**..192 Ill. App. 162

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**Bartlett ads. Cobe**.....191 Ill. App. 242

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**Baxter v. City of Venice**.....194 Ill. App. 62

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**Becker v. Sanitary Dist. of Chicago**..194 Ill. App. 639

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**Belleville Sav. Bank et al. v. Mercan-**

**tile Trust Co. et al.**.....194 Ill. App. 175

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Chicago City Ry. Co. ads. Pattison...	195 Ill. App. 527
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Chicago Rys. Co. ads. Gillman.....	185 Ill. App. 396
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- City of Aurora ads. Swenson.** . . . . .196 Ill. App. 83  
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- City of Charleston ads. Eastern Illinois State Normal School.** . . . . .193 Ill. App. 600  
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- City of Chicago ads. Enberg.** . . . . .191 Ill. App. 101  
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- City of Chicago ads. Mecartney.** . . . .194 Ill. App. 592  
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- Claney ads. Soden.** . . . . .185 Ill. App. 596  
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- Clark et al. ads. Stewart.** . . . . .194 Ill. App. 2  
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- Cobe v. Bartlett.** . . . . .191 Ill. App. 242  
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- Commissioners of Highways et al. ads. Posey** . . . . .196 Ill. App. 597  
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- Commons v. Snow.** . . . . .194 Ill. App. 569  
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- Commonwealth Trust Co. et al. ads. Owens** . . . . .196 Ill. App. 571  
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- Connell ads. Wertz.** . . . . .196 Ill. App. 211  
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- County of Lake v. Westerfield.** . . . .196 Ill. App. 432  
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- Cowan v. Bouffleur.** . . . . .192 Ill. App. 21  
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- Crilly ads. Fox et al.** . . . . .192 Ill. App. 301  
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- Danville Collieries Coal Co. ads. Lev-  
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- Danville, Urbana & Champaign Ry.  
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- Daube v. Kuppenheimer et al.**.....195 Ill. App. 99  
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- Davis ads. Calumet & Chicago Canal  
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- Delaney v. McNeil & Higgins Co. et  
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- Dells et al. v. Brogfen et al.**.....192 Ill. App. 581  
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- Devine v. Chicago City Ry. Co.**.....195 Ill. App. 305  
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- Devine ads. La Page's Estate, In re.**195 Ill. App. 140  
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- Devine v. Rosenbaum Bros.**.....192 Ill. App. 30  
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- Dodson ads. Arnold**.....193 Ill. App. 62  
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- Doubet v. Doubet**.....196 Ill. App. 289  
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- Dougherty et al. ads. Rice**.....194 Ill. App. 462  
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- Dunham v. Slaughter**.....190 Ill. App. 497  
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- Earle et al. ads. Vossler**.....194 Ill. App. 522  
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- Farrell ads. Claffy.....196 Ill. App. 239  
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- First Nat. Bank of Leroy ads. Chis-  
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- Greeman Bros. Mfg. Co. v. M. L. Nelson Furniture Co.** .....191 Ill. App. 494  
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- Grossfeld & Roe Co. v. Zuckerman**..192 Ill. App. 90  
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- Hagen Paper Co. v. East St. Louis Pub. Co.** .....190 Ill. App. 581  
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- Hammond ads. Ritsher**.....196 Ill. App. 27  
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- Hartford Fire Ins. Co. ads. Wilson**..188 Ill. App. 181  
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- Harwood's Estate, In re**.....193 Ill. App. 514  
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- Head et al. v. Village of Wood River et al** .....194 Ill. App. 104  
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- Heinsen ads. Illinois Improvement & Ballast Co.** .....193 Ill. App. 82  
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- Jasper v. Griffen Wheel Co.**.....194 Ill. App. 517  
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- Johnson ads. Fox et al.**.....192 Ill. App. 301  
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- Johnston ads. O'Hare.**.....194 Ill. App. 153  
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- Kern v. Western Life Indemnity Co.**192 Ill. App. 96  
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- Kimball Co., W. W. v. Polakow.**....190 Ill. App. 174  
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- McCarahan ads. Billboard Pub. Co.**..192 Ill. App. 384  
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- McCarty ads. Shultz**.....193 Ill. App. 318  
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- McNeil & Higgins Co. et al. ads. Delaney** .....195 Ill. App. 524  
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## **MEMORIAL SERVICES.**

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**Held in the Appellate Court of the First District on the  
Death of Honorable Frank Baker.**

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Memorial services held Tuesday, October 3rd, 1916, at the Courtroom of the Appellate Court of Illinois for the First District, at Chicago, in memory of the late

**HONORABLE FRANK BAKER,**  
a Justice of this Court.

**Present:** Hon. William H. McSurely, Presiding Justice, and the Hon. Jesse Holdom, Associate Justice; also present, the Justices of both the branch courts: Branch 1, Hon. Albert C. Barnes, Presiding Justice, Hon. John P. McGoorty, Associate Justice, and Hon. Charles A. McDonald, Associate Justice; Branch 2, Hon. John M. O'Connor, Presiding Justice, Hon. Clarence N. Goodwin, Associate Justice, and Hon. Thomas Taylor, Associate Justice.

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**PRESIDING JUSTICE MCSURELY:** As we all know, during this vacation period just passed, after a long continued and heroic conflict with disease, Mr. Justice Frank Baker died. The Courts of this County and State will not soon lose the impress of his personality and the high distinctive quality of his work. It is appropriate that this Court should upon its records spread some permanent memorial expressing our esteem for him and his work. Mr. Justice Holdom has prepared and will read such a memorial. Mr. Justice Holdom.

**MR. JUSTICE HOLDOM:** Brethren of the Bench and Bar: Since the adjournment of this Court for the summer vacation and on July 7, 1916, the Hon. Frank Baker, the Senior Justice of this Court, passed to his eternal reward.

It is fitting at this time, the first sitting of the Court following the death of Mr. Justice Baker, and when the place so lately occupied by him is still vacant, to take a short retrospect of his useful and manly career.

Judge Baker, at the threshold of his early manhood, answered his Country's call to fight to preserve the Union of the States. He enlisted in the 84th Regiment of Volunteers of his native State of Ohio. Upon his retirement to private life he continued the study of the law, which had been interrupted by his military service, and entered upon its practice in his home Town of Tiffin, Ohio.

In the year 1873 Judge Baker came to Chicago and resumed the practice of his profession, which he prosecuted successfully, making his way at this Bar as a forceful, astute counselor and a painstaking, convincing trial lawyer. He was equally masterful before court and jury. He was well grounded in the fundamental principles of the law and always abreast of judicial interpretation. After fourteen years at the Chicago Bar, where he won his spurs in the forensic forum, he was elected in June, 1887, a Judge of the Circuit Court, to which position he was five times successively returned by the votes of the people. In June, 1903, the Supreme Court assigned Judge Baker for service in Branch "B" of this Court, where he served for six years, and by successive appointments thereafter he served seven years in this Court.

Judge Baker's most enduring monument is the one which he erected for himself in his judicial writings. His first Opinion appears in Volume 108 of the Reports of this Court, and his Opinions appear in all the subsequent volumes to the present time, ninety volumes in all, covering a period of judicial service in this Tribunal of thirteen years, and a continuous active judicial service of twenty-nine years. In this large accumulation of judicial literature the profession will find its guides and landmarks. It embodies a store of judicial learning. So long as the common law exists the Opinions which Judge Baker wrote will be consulted as authoritative repositories of its principles, not only in this State but wherever the same rational system of jurisprudence may prevail. Judge Baker was hard working, painstaking and conscientious in the discharge of his judicial duties. At *nisi prius* he was a terror to the lawyers who tried their cases without due preparation. He never at-

tempted to conceal his impatience with this class of practitioners. Yet, under a brusque exterior he concealed a kindly disposition and a gentle nature. He was more than tolerant of the young lawyer and ever ready to aid over the rough places those who diligently worked. Judge Baker was respected by the Bar for his legal learning and attainments and the strength and probity of his character.

Judge Baker's mind was essentially analytical and logical. He had a great facility for grasping the controlling principles involved and disentangling them from immaterial considerations and arriving without difficulty at a logical and correct result. This power to analyze cases and thereby to indicate the true principles by which the decision should be governed, rendered his assistance in conference particularly helpful to his associates, and it is in the conference room that his loss will be most severely felt by the surviving members of the Court.

In political faith Judge Baker gave his adherence to the Democratic party, to whose tenets he was ever loyal; yet, no party political proclivity was ever evident as a factor in his judicial conclusions. He fully realized that he was a Judge of all the People, and that his judgments must be environed by the law of the land.

Judge Baker was cast in heroic mould. For years he endured acute physical pain uncomplainingly, like the stoic that he was. Notwithstanding this physical handicap, he never shirked a duty and discharged his full measure of judicial labor. Judge Baker is worthy to be classed with those other great judicial characters which the Democratic Party gave to sit in the judgment seat in this County—McAllister, Adams, Rogers, Tuley and Moran—and to sit with them high on the pedestal of judicial fame.

Judge Baker outlived the threescore years and ten span of life allotted to man by Holy Writ, for at the time of his death he had passed his seventy-sixth year.

While Judge Baker was tenacious of life and unwilling to yield to the call of the Hereafter, yet when he realized that further struggle for life was futile he calmly surrendered himself to the inevitable. In the full possession of his mental faculties, and surrounded by his devoted wife and other members of his family, he peacefully passed to his eternal sleep "Like one who calmly wraps the drapery of his couch about him and lies down to pleasant dreams."

The foregoing memorial minute, an expression of appreciation and affection for the life and character of our late Associate, will be spread at large upon the records of this Court, which he so adorned in his lifetime, and also printed in the current number of the Illinois Appellate Court Reports.

**PRESIDING JUSTICE MCSURELY:** We have here today a former Judge of the Circuit Court, a friend of Judge Baker's, and a friend of all of us. The Court takes great pleasure in recognizing, in response, on behalf of the Bar, the Hon. Richard Clifford.

**HON. RICHARD CLIFFORD:** If the Court please, the honor and privilege of responding on behalf of the Bar has fallen to me, but I much prefer that another had been chosen.

My relationship with the Judge was close since our election to the Bench, and, well as I knew him, there is little for me to add to what has been so well presented in the course of the memorial, and, more than that, I will be found, here and there, repeating what has been already said.

If his wishes could be consulted, the ceremonies would be short and simple. "Speak of me as I am, nothing extenuate." He never wanted to be anybody but himself.

He was a trained lawyer, with a mind big and broad, and little use had he for pin points. He went directly to the marrow of the question. There was a turning point in every case, and he was quick to see it. His inquiry was always what was right, where was the justice of the case, and then he made up his mind what the law ought to be, and his first impressions were generally correct. His offhand opinion on a legal question was excellent. He was a diligent worker himself, and it is true, as the Court has declared, he did not have much patience with a slovenly or lazy lawyer. His own training and study had been such as to make him accurate. For the first few years after his admission to the Bar in Ohio he acted as Clerk of the Court, and he drew all his orders, and sometimes he used to say when careless lawyers would present papers to him to sign, "What is that?" It didn't look like an order, and it did not look like a judgment to him, a man who was so well trained and thorough.

In pleading he was unusually good, and it did not take him long to decide whether a declaration was good or not.

No doubt the Judge's manner at times, as has been said, was brusque, and some got a wrong impression of him; yet he had a tender heart, and was one of the kindest of men. His great love and affection for his home and family were noticeable, not that he ever spoke of it,—he tried to conceal it. Those who knew him best liked him the best, and that is still a good test of a man.

In so many ways he was a model Judge, industrious, courageous, capable, honest and impartial. He knew neither plaintiff nor defendant. It was of no consequence to him who the parties were. Not a lawyer who ever lost a case before him doubted his honesty and sincerity.

Some thought that his reputation grew since his elevation to the Appellate Court, but for myself, I always said of him, he was one of our best lawyers on the Bench. And good opportunity had I to form an opinion of him, for, in our daily walks, many points of law were discussed.

The Judge was an unostentatious and very modest man. He never spoke of himself nor his position on the Bench; he never alluded to it in any way, nor to his fine ability. He was a good scholar, but never prone in any way to display his learning. With the people he always stood high. He never courted popularity, nor did he ever try to gain public applause by any of his judicial opinions or utterances, and no one can say that he ever tried to gain favor with the Bar. In no sense was he a sensational Judge. Whatever case came to him, he was content with it. During his long public service no one ever questioned his motives, and he leaves an enviable record indeed. The memorial has truly said his reputation will rest on his decisions, which rank with the best appearing in the Reports. The lawyers will always consult them, knowing that there the principles of law were strongly and clearly stated, and that he was a Judge who seldom struck a wrong note.

Our Appellate Court has been unusually distinguished. And it is only of those who are not living am I now speaking. It would be hard to select three Judges from any Court in this Union, State or Federal, who ranked higher than McAllister, Moran and Adams as lawyers, and to the illustrious list of the dead, may we be permitted to add the name of Baker. There was not a sitting Judge on this Bench whose opinions were so often asked for by his associates, or more respected by them.

There is a vacant chair here, and, as has already been said, fortunate indeed will be this Court and this State if his successor fills the position as well as he.

But let us speak about him as a friend also. He was a loyal friend, a good companion, and one of the manliest of men. He was as manly as he looked, and greater praise cannot be said. Often, when he was in the grip of his fatal disease, you would find him apparently oblivious to his sufferings, and he would appear as pleasant and agreeable as in his best days. He was a good, faithful servant of the people, and well deserved his high reputation. He will be long remembered as one of the best Judges Cook County ever had.

**PRESIDING JUSTICE MCSURELY:** I am sure we have all been moved by the exceedingly impressive tribute by Judge Clifford, unique and impressive, because I think we all know and feel that there was no tone or syllable of exaggeration in anything he said. It was a restrained tribute to an extraordinary man.

Speaking on behalf of the Court generally, we can echo and reaffirm what Judge Clifford has said. Not only was Judge Baker one of the best Judges that sat upon this Bench, but I know I speak the opinion of all the Judges here present, that we unanimously and unqualifiedly conceded he was head and shoulders above any of us. We looked to him for advice, and he never failed. And speaking for those who were in the closer intimacy of friendship with him, those of us who were in daily contact with him and his personality, we are moved beyond expression at this sad loss.

Mr. Clerk, let the memorial minute as read by Mr. Justice Holdom, and the response thereto by Judge Clifford, be spread upon the records of this Court.

And this concludes our formal tribute to our late associate, Mr. Justice Baker.

**CASES**  
**DETERMINED IN THE**  
**FIRST DISTRICT**  
**OF THE**  
**APPELLATE COURTS OF ILLINOIS**  
**DURING THE YEAR 1915.**

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**Thomas J. Healy, Administrator, Appellee, v. Chicago  
City Railway Company, Appellant.**

**Gen. No. 20,322. (Not to be reported in full.)**

**Appeal from the Superior Court of Cook county; the Hon. MARCUS A. KAVANAGH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed December 8, 1915. Rehearing denied December 21, 1915. *Certiorari* denied by Supreme Court (making opinion final).**

**Statement of the Case.**

**Action by Thomas J. Healy, administrator of the estate of Michael Moriarity, deceased, plaintiff, against the Chicago City Railway Company, defendant, in the Superior Court of Cook county, to recover for the death of plaintiff's intestate as a result of the alleged wrongful act of defendant. From a judgment for plaintiff for \$5,000, defendant appeals.**

**FRANKLIN B. HUSSEY and CHARLES LEROY BROWN, for appellant; JOHN R. GUILLIAMS, of counsel.**

**CASWELL & HEALY, for appellee.**

**MR. JUSTICE PAM delivered the opinion of the court.**



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Healy v. Chicago City Ry. Co., 196 Ill. App. 1.

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### Abstract of the Decision.

1. **DEATH, § 78\***—*when instruction on negligence properly refused as misleading.* In an action to recover for the death of plaintiff's intestate caused by injuries received while a passenger on defendant's electric car, an instruction to the effect that evidence that an accident has occurred is not evidence of negligence on the part of defendant, *held* properly refused, as tending to mislead and confuse the jury, in that it singled out one item of evidence and stated that a certain conclusion would follow therefrom.

2. **TRIAL, § 155\***—*province of jury to weigh conflicting evidence.* Where the evidence is conflicting, a question of fact for the jury is presented.

3. **TRIAL, § 155\***—*province of jury to determine weight and truth of evidence.* It is always the province of the jury to determine the weight of evidence and the credibility of witnesses as well as the question as to which of the witnesses is better entitled to be believed.

4. **APPEAL AND ERROR, § 1410\***—*when verdict will not be disturbed on review.* Where the evidence is conflicting, a verdict of a jury will not be disturbed on review unless clearly and manifestly against the weight of the evidence.

5. **CARRIERS, § 476\***—*sufficiency of evidence as to negligent death.* In an action to recover for the death of plaintiff's intestate alleged to be due to the wrongful act of defendant, where the death of deceased was caused by being brought in contact with an iron pole standing near defendant's street railway track, deceased being at the time of the accident a passenger on one of defendant's electric cars, evidence examined and judgment for plaintiff *held* sustained by the evidence.

6. **CARRIERS, § 480\***—*whether person on car a passenger as question for jury.* In an action to recover for the death of plaintiff's intestate caused by injuries received while a passenger on defendant's electric car, the question whether at the time of receiving such injuries deceased was a passenger as alleged is for the jury.

7. **CARRIERS, § 480\***—*when contributory negligence of passenger question for jury.* In an action to recover for the death of plaintiff's intestate caused by injuries received while a passenger on defendant's electric car, the question whether recovery is barred by contributory negligence is for the jury.

8. **APPEAL AND ERROR, § 1512\***—*when remarks of court on credibility of witness harmless error.* In an action to recover for the death of plaintiff's intestate as a result of the wrongful act of defendant, the remark of the trial judge that a witness for plaintiff who was under cross-examination had stated a matter differently, which,

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Waters v. Universal Store Specialties Co., 196 Ill. App. 3.

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on exception to the remark, was followed by an examination of the witness in regard to the matter adverted to, *held* not prejudicial where the fact stated by the court was not denied by defendant and was borne out by the record, for the reason that the remark was natural and that when defendant excepted the court may have supposed that counsel took issue with him as to the correctness of witness' testimony, and hence interrogated witness further, and also for the reason that such statement and examination was a just and reasonable exercise of the judicial function.

9. WITNESSES, § 178\*—*when questions put to witness objectionable in form.* Questions to a witness containing a positive assertion rather than a query, and which are in the form of a contradiction of the witness, are objectionable.

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**John F. Waters, Defendant in Error, v. Universal Store Specialties Company, Plaintiff in Error.**

**Gen. No. 20,386. (Not to be reported in full.)**

Error to the Municipal Court of Chicago; the Hon. JOHN K. PRINDIVILLE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed December 8, 1915.

**Statement of the Case.**

Action by John F. Waters, plaintiff, against the Universal Store Specialties Company, a corporation, defendant, in the Municipal Court of Chicago, to recover on a contract of employment. To reverse a judgment for plaintiff for \$215, defendant prosecutes this writ of error.

Plaintiff's cause of action is based on a written contract of employment with defendant wherein the latter agreed, among other things, to advance to plaintiff the sum of \$50 per week for a period of one year. This contract is dated May 28, 1913, and plaintiff's claim is for nine weeks' advances, \$450, less a credit of \$235,

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Waters v. Universal Store Specialties Co., 196 Ill. App. 3.

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being moneys due defendant from customers, which moneys plaintiff had collected and retained.

While defendant in its affidavit of merits sets forth several defenses, yet upon the trial of the case the principal defense relied on was that plaintiff had not given a bond as required by the contract, but in lieu thereof had entered into a new contract of employment which superseded the written one.

The only evidence offered on behalf of the plaintiff was the contract itself, and plaintiff's testimony that he had not received advances from defendant for a period of nine weeks, and that there was due him under said contract for advances the sum of \$450; that he had collected moneys due defendant to the extent of \$235, for which he had given it credit, leaving a balance due of \$215.

It appeared, on examination of plaintiff under section 33 of the Municipal Court Act (J. & A. ¶ 3345), and from the testimony of H. E. Dugan, district sales manager of the defendant, that plaintiff had received in advances more money than was earned by him in commissions under the contract of employment; that shortly after October 31, 1913, in a conversation with plaintiff, Dugan read to plaintiff a letter which he had received from defendant, which letter was as follows:

“With regard to Mr. Waters, his account has been speedily going behind, as you know, and the statement for the last week shows a net overdraft, or difference between overdraft and prospective, of \$460.98. We wish you would have a talk with Mr. Waters and endeavor to show him that we cannot possibly keep remitting him \$50 per week unless he does business to warrant our doing so. When the writer saw him, and in his correspondence about September 1st, he told of a great many sales that he surely could close during September, or soon, and these sales have not matured. If they had, no doubt his account would be in different shape. If he will consent to having his remittance reduced to an amount that he can earn, we will con-

tinue with him, but if not, we shall certainly have to cut him off the remittance list. In his application he states that he can give a personal bond, signed by two owners of real estate. If he can furnish such a bond that will protect us against loss by making him the advances that we have agreed to make against his commissions, we will be willing to go along with him, but we cannot take a chance of losing any money on his account."

That at said conversation he requested plaintiff to furnish a bond as required under section 9 of the contract and in accordance with the letter above quoted. Plaintiff testified that Dugan stated to him that the company might want him to give a bond.

Dugan testified that plaintiff stated he would not give a bond; that upon the refusal of plaintiff to give a bond, he informed plaintiff that defendant would make no further advances to him, but that if he wished to continue selling goods on the same commission, defendant would advance him fifty per cent. on commissions earned, and apply the remaining fifty per cent. on the indebtedness due defendant; that plaintiff stated that he was satisfied but that he wanted him (Dugan) to write defendant a letter for him, asking the company to advance sixty-five per cent. of his earned commissions, and apply the remainder, thirty-five per cent., on the indebtedness due from him to the defendant.

Plaintiff did not deny that these terms were discussed, but insisted that he refused to accept the proposition; admitting, however, that he asked Dugan to write defendant a letter requesting that he be allowed to draw sixty-five per cent. instead of only fifty per cent. of his earned commissions.

The testimony further disclosed that thereafter plaintiff sent in two orders on which his commission amounted to \$96.26; that shortly thereafter he telegraphed defendant as follows:

"No sinews of war, commissions last week \$96."

That after sending this telegram, he received a check

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Waters v. Universal Store Specialties Co., 196 Ill. App. 3.

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from Dugan for \$48.13, exactly fifty per cent. of the commissions earned by him; that this was the last business transaction plaintiff reported to the defendant. The evidence further disclosed that on November 14, 1913, plaintiff received the following letter in response to one he had written defendant on the 12th:

“I have received your personal letter of the 12th inst., and as before you receive this you will have received the remittance sent you yesterday, no doubt financial matters will be all satisfactory. I believe that you may possibly work a little harder on a straight commission basis, and if you do, I feel sure that you will get in enough orders so that you will make more money than you did on the basis of a regular weekly remittance. I appreciate the difficulties you have had on account of competition you have had, but it is no worse in Chicago than it is in New York and many other sections, and so long as we have so many superior features on our machines and the right sort of salesmen to present these features to the merchants, I am convinced that we will get our share of the business. I suppose the company cannot afford to pay more than its regular percentage for getting business, and naturally a badly overdrawn account is discouraging here, and calls for some action to head off a possible loss.”

Upon this evidence the court found the issues for the plaintiff.

WILLIAM J. DILLON, for plaintiff in error.

JAMES J. KELLY, for defendant in error.

MR. JUSTICE PAM delivered the opinion of the court.

### Abstract of the Decision.

CONTRACTS, § 385\*—*when evidence insufficient to establish existence of contract sued on.* In an action to recover on a written contract whereby defendant agreed to employ plaintiff, evidence examined and judgment for plaintiff *held* not sustained by the evidence, it

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Fairfield v. Union Life Ins. Co., 196 Ill. App. 7.

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appearing therefrom that the contract sued on had been annulled by consent of both parties, and a new arrangement on different terms substituted in regard to the subject-matter of such contract, to which plaintiff had assented.

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**Marjorie Fairfield, Appellee, v. Union Life Insurance Company, Appellant.**

**Gen. No. 20,966.**

1. **INSURANCE, § 868\***—*when falsity of answers in application must be pleaded and proved.* A condition in a policy of life insurance that the policy "shall not take effect until the first premium has actually been paid to and accepted by the company, and the policy actually delivered to and accepted by the insured while in good health," is a matter of defense and not a condition precedent to be averred and proved in order to maintain an action on the policy, so that where the defense is grounded on the falsity of answers made in an application which is made part of the policy, such falsity, to be available in defense, must be averred and proved by defendant, whether such condition in the policy be a representation or a warranty.

2. **INSURANCE, § 854\***—*when provision in application requiring good health and acceptance of premium not condition precedent.* A condition in an application for a policy of life insurance for verifying the truth of the answers therein made by the applicant and providing that the policy shall not take effect until the first premium is accepted by the company, and the policy delivered to insured "while in good health," is intended to safeguard insurer against the contingency that in the interim between the acceptance of the risk and the delivery of the policy insured's health may become impaired, hence such a condition has no application where the contingency guarded against never happened.

3. **INSURANCE, § 763\***—*how incontestable clause should be construed.* Provisions in policies of life insurance that after a named time the policy in question shall be incontestable are reasonable and must be strictly construed against insurer, as such provisions inure to the benefit of insured and are intended to induce persons to become policy holders.

4. **INSURANCE, § 763\***—*incontestable clause as waiver of avoidance on other grounds.* A provision in a policy of life insurance that

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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1      Fairfield v. Union Life Ins. Co., 196 Ill. App. 7.

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"this policy is incontestable after one year, except for the nonpayment of premiums," precludes insurer, after the time fixed, from avoiding the policy on any ground except that expressly reserved, the language being clear and explicit, because any other holding would destroy the value of such a provision.

5. INSURANCE, § 740\*—*how provision for extension of time for payment of premium should be construed.* A provision in a policy of life insurance that insurer may have an extension of thirty days in which to make payment of premiums after the time fixed by the policy for such payment, on condition that insured pay five per cent. interest on the amount of such premiums during such extension, is a provision intended for the benefit of insured and intended to induce him to become such.

6. INSURANCE, § 763\*—*when the taking effect of incontestable clause not postponed.* In an action to recover on a policy of life insurance containing a provision making the policy incontestable after the expiration of one year and a provision that on certain conditions insured might have an extension of the time fixed by the policy for payment of premiums, where the second payment of premium was tendered after the time fixed in the policy for such payment but within the extension allowed thereby, and more than one year after the payment of the first premium, defendant's contention that as he took advantage of the extension of time for payment of premium allowed by the policy the taking effect of the incontestable clause was also postponed, hence that at the time of such tender such clause had not taken effect, *held* negatived by the facts that up to the time of such tender defendant had taken no steps to avoid the policy, and that during the period of extension allowed by the policy defendant wrote insured urging him to make payment before such extension period expired in order to avoid lapse, such letter amounting to an affirmation that the policy was still in force.

Error to the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed December 8, 1915.

**Statement by the Court.** This is an action in assumpsit brought by Marjorie Fairfield, appellee (plaintiff below), against the Union Life Insurance Company, appellant (defendant below), upon two insurance policies issued on December 7 and 27, 1910, respectively, by the defendant to Edward B. Fairfield, husband of the plaintiff, and to whom we shall hereinafter refer as the insured.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



The declaration consisted of three counts: The first declared on policy #2482, dated December 7, 1910, in the sum of \$5,000, the insured being Edward B. Fairfield and the beneficiary Marjorie Fairfield, under the name of Marjorie B. Fairfield. It set forth the usual allegations, viz., the issuance of the policy, its terms, payment of the premium, death of the assured, and the giving of notice and making proof thereof to the company. The second count was, in all respects, identical with the first, save that it declared upon policy #2706 dated December 27, 1910. The third count was a joint count declaring on the two policies, making the same allegations as to the two as were previously made as to each one. Both policies were attached to the third count and made a part thereof.

To these counts defendant filed a general and special demurrer, the special grounds (of the demurrer) being, in substance, that plaintiff had not averred performance of all conditions precedent to the recovery on the contracts or shown a waiver thereof by the defendant. Upon the demurrer being overruled, a plea of general issue was filed, with notice of special defenses. The substance of the special matters of defense as set forth in defendant's brief was as follows: "That the contracts or policies of life insurance never came into existence by reason of the fact that a certain condition precedent was not complied with, to-wit, the acceptance of the policy by the insured and the payment of the premium by the insured while the insured was in good health, and second, that the policies were not delivered to the insured or accepted by the insured while he was in good health in accordance with the terms of the policy; that the insured represented in the application that he had never been refused insurance by any other company prior to applying to the Union Life Insurance Company for insurance, whereas he had been refused insurance by a number of companies and as late as a month prior to making application to the



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Fairfield v. Union Life Ins. Co., 196 Ill. App. 7.

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defendant company herein, and that not only that, but that he knew he had been refused insurance and had wilfully and fraudulently denied the fact in his application to the defendant company. Further, that the assured knew that he was not in a proper state of health and made various misrepresentations as to his condition of health, as to his use of liquors, etc.”

Upon the trial of the case plaintiff introduced evidence in support of the allegations set forth in her declaration. At the close of the plaintiff's testimony defendant moved for an instructed verdict, on the same grounds as were set forth in its special demurrer, viz., that plaintiff had failed to prove all the conditions precedent to a recovery, which motion was denied. Defendant then offered evidence in support of its plea of general issue and the special defenses therein set forth. All its tendered evidence was excluded by the court, except certain documentary evidence, consisting of defendant's exhibits 2, 3, 4 and 5, being the applications in connection with the policies sued upon, the statements to the medical examiner and a notice of change of beneficiary, respectively.

At the close of all the evidence defendant renewed its motion for an instructed verdict, which was again denied. Plaintiff then tendered a motion to instruct the jury to return a verdict for the plaintiff and to assess her damages in the sum of \$11,006.95, which instruction was given by the court over the objection of the defendant. A verdict was returned in accordance with said instruction, and upon such verdict the judgment was entered, to reverse which defendant has prosecuted this appeal.

EASTMAN & WHITE, for appellant; RALPH R. HAWKHURST, of counsel.

CHARLES J. O'CONNOR, R. HAROLD O'CONNOR and EDWARD C. KESLER, for appellee.

MR. JUSTICE PAM delivered the opinion of the court.

Defendant assigns five reasons in support of its contention for reversal, viz.:

“(1) That the court committed error in refusing to allow the defendant to prove the fraud practiced by the plaintiff in obtaining the policies, through the false representations made in the applications and which became warranties under the law as hereinafter shown.

“(2) That the court erred in refusing to instruct a verdict for the defendant, both at the close of the plaintiff's case and at the close of all the evidence, in that the plaintiff failed to prove as a part of its case a condition precedent to the right of recovery, to-wit, that the insured received the policies and paid the first premium while he was in good health in accordance with the terms of the contract and his express agreement in the application.

“(3) That the court erred in ruling that the incontestable clause prevented any contest being made on the policy in that the incontestable period under the proper construction here contended for had not expired, the second premium being tendered only during the days of grace and never being accepted by the company.

“(4) That the court erred in instructing a verdict for the plaintiff for the reasons above set forth and for the further reason that the question of compliance with the condition precedent is a matter of fact for the jury, regardless of any other evidence offered and under the general issue that fact as well as other facts were put in issue which should have gone to the jury, as hereinafter commented upon.

“(5) That the court erred in overruling the defendant's motion in arrest of judgment in that the declaration failed to allege the performance of the condition precedent heretofore suggested.”

These contentions of the defendant depend, first, upon a clause in the policies which is in part as follows:

“The policy shall not take effect until the first premium has actually been paid to and accepted by the company or its authorized agent and the policy deliv-

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ered to and accepted by the insured while in good health;”

and further, upon that part of the applications which under the terms of the policies is made a part thereof, and which is as follows:

“That every statement and answer herein above contained, and every statement I make to the company in this application is true, that this application shall be a part of the policy issued hereupon, and that such policy shall not take effect unless the first premium shall be actually paid in cash while I am in good health.”

Defendant contends that by this provision in the policies and in the applications, before plaintiff could recover, she had first to allege in her declaration and prove as part of her case, as a condition precedent, that the insured at the time the first premiums were paid and the policies delivered was in good health.

As against this contention of the defendant, plaintiff urged, first, that these provisions in the policies and in the applications were not conditions precedent, and furthermore, that even though they were, under the facts in evidence, such defense could not be made because of the incontestable clause in each policy, which was as follows: “This Policy is Incontestable after one year, except for the non-payment of premiums.” To meet this claim, defendant urges that the plaintiff was not entitled to the benefit thereof. This, however, is a separate contention which will be considered later in the course of our opinion.

In passing upon the various contentions of the parties, it is necessary to set forth certain essential facts in evidence concerning which there is no dispute.

There were two policies of insurance, each for \$5,000, issued on the 7th and 27th of December, 1910, respectively. The premiums for the first year, amounting to \$381.70, were paid. In July, 1911, the insured's daughter was named as beneficiary in place of his wife, but in October following, this action was rescinded, leaving

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the wife as the beneficiary. In November, 1911, defendant mailed to the insured notices for the payment of the annual premiums due on these policies. In the instance of policy number 2482, the notice read in part as follows:

“You are hereby notified that the annual payment of \$190.85 will be due the 7th day of December, 1911, and must be paid at the Home Office of the Company in Chicago, Ill., or to our authorized agent in exchange for the Company’s official receipt, duly countersigned by A. E. Fowler.”

The other notice was the same, save as to the maturity of the payment, which in the instance of policy number 2706 was December 27th. On December 30, 1911, the following letter was sent by the defendant to the insured:

“The annual premium on your policy # 2482 for \$190.85 was due Dec. 7th. Please give this premium your candid consideration, as the same will lapse the 7th of next month. To renew thereafter would require your signature to a health certificate, etc., and this we believe you as well as ourselves wish to avoid.

“You realize as well as we do that there is no better asset than a life policy. Aside from the protection you give your family or beneficiary, it is one of the best collaterals as security that you can obtain. While we do not believe it is your intention to drop your policy, we wish to remind you that you may have the matter in mind before the expiration of the 30 days of grace. We cannot insist too strongly on your retaining the same. Should you deem the policy too large for you to carry, we will with pleasure reduce it or change it to any kind of policy you might prefer to carry.

“Please be kind enough to give us your reply, and awaiting the same with your remittance, we remain,

Yours very truly,

A. E. FOWLER,  
Assistant Secretary,  
W.”

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It was stipulated that on or about the 4th of January, 1912, plaintiff had made tender to the defendant of the second year's premiums, which tender was refused. The insured died on February 22, 1912, and the notice and proof of his death were made as required under the policies. All this evidence was offered as part of the plaintiff's case.

In support of its contention that the first premium must be paid in cash and the policies delivered to the insured while in good health, as a condition precedent, defendant cites some Illinois decisions. Counsel, however, admits that in none of them has such condition in the policies been passed on, but argues by analogy for his contention, viz., that in those cases it is held that the payment of the premium is one of the conditions precedent which must be alleged and proven; that therefore in the case at bar, the payment of the first premium being qualified by the words, "while in good health," necessarily the condition precedent as to the payment of the premiums carries with it such qualification. An examination of the case of *Continental Life Ins. Co. v. Rogers*, 119 Ill. 474, which is typical of the Illinois cases cited on this point, shows that the question of the insured being in good health at the time of the payment of the premium and the delivery of the policy was not in issue. However, in that case it was held that the truth of the answers to the questions in the application and which, by the terms of the policy, were made a part thereof, was not a condition precedent which had to be averred and proven. On the contrary, it was there held that to be availed of as a defense, whether they were warranties or representations, their falsity must be set up and proven by the defendant as a matter of defense. This principle of law has been announced in previous decisions by our Supreme Court.

One of the clauses relied upon by the defendant is contained in the general provisions appearing on the back of each policy and is expressly made a part thereof. The other provision relied on is contained in the applications. If any reasoning by analogy can be indulged in from this decision, in our opinion it is favorable to the contention of the plaintiff that these provisions did not constitute a condition precedent.

The defendant placed in evidence the applications of the insured for the policies in question and the record of the examination made by its medical examiner in connection with said applications. The obvious purpose of propounding the questions in the applications, and of making a medical examination of the insured before issuing the policies, was to determine his general state of health *at that time*. That the defendant considered the health of the insured satisfactory is evidenced by the delivery of the policies and the acceptance of the first year's premiums. The record herein shows that a period of time elapsed between the date of the applications and the medical examination above referred to, and the delivery of the policies. It is fair to presume that this situation arises in almost every instance where the defendant issues a policy. In that interim the insured may have become seriously ill or suffered a severe injury greatly impairing his health. It is therefore fair to presume that the provision that said policy "shall not take effect until the first premium has actually been paid to and accepted by the company and the policy delivered to and accepted by the insured while in good health," was intended to safeguard the defendant against any contingencies that might arise during such interim, and not as a condition precedent for the plaintiff to aver and prove; and as there is no contention that such contingency has arisen in the case at bar, the provision here under consideration can have no application.

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Counsel, however, places great reliance in *Anders v. Life Ins. Clearing Co.*, 62 Neb. 585; but in that case the facts are so completely different from the facts in the case at bar that the ruling of the court therein cannot be held to apply. In the first place, the facts with reference to how the insurance was obtained are different. The provision there under consideration was as follows:

“This policy shall not take effect until the first premium thereon shall have been paid to the company, or to some person authorized by the company to receive it, in accordance with the premium receipt accompanying the same, and while the insured is in good health, *as evidenced by health certificates properly executed and furnished to the company.*” (Italics ours.)

The court in that case did not hold that as a condition precedent it must be averred and proven that at the time the first premium was paid and the policies delivered the insured was in good health, but that before there could be a recovery, it was necessary to aver and prove that the insured had submitted the health certificates as provided for in the policy. We cannot construe such a holding as supporting the contention of the defendant.

Plaintiff further contends that under the incontestable clause in the policies, if said clause applied, the only defense available was the nonpayment of the premiums. Said clause provided as follows: “This Policy is Incontestable after one year, except for the nonpayment of premiums,” and no doubt was incorporated in the policies as an inducement to secure business, as it could only have been intended to inure to the benefit of the holder of the policy. Such a provision has been held by our courts to be reasonable (*Royal Circle v. Achterrath*, 204 Ill. 549; *Flanigan v. Federal Life Ins. Co.*, 231 Ill. 399), and must be strictly construed against the defendant.



Defendant contends that the incontestable clause never took effect because the policy was not in force. The essence of defendant's contention in this regard is, that the incontestable clause was a conditional agreement dependent upon whether or not at the time of the delivery of the policies and the payment of the first premiums, the assured was in good health; that therefore, even though plaintiff was not required to show that he was in good health as a condition precedent, yet such defense having been specially noticed under the general issue, defendant should have been allowed to make proof thereof; that the evidence offered under this defense, but excluded by the court, would have demonstrated conclusively that the plaintiff could not have shown that at the time the policies were delivered and the first premiums paid, the insured was in good health—a condition precedent to the policies being in force. This same point was passed upon in *Mutual Reserve Fund Life Ass'n v. Austin*, (73 C. C. A. 498, 142 Fed. 398), 6 L. R. A. (N. S.) 1064, in which case the incontestable clause provided for a three-year period, and therein the court said (p. 1065):

“In construing this incontestable clause, we must not lose sight of the fact that it relates, not to the risk at the date of the policy, but at a period three years later, and to a risk that is different in character.

“The agreement concerning the original assumption of risk is distinct and independent from the agreement that the policy, after it has been outstanding three years in the possession of the assured, shall be incontestable. The document contains two separate agreements by the company: (1) To insure conditionally for three years; (2) to relinquish defenses after three years. Each of these forms a part of the consideration for which the assured pays his money. They relate to distinct subject-matter, to different dates. \* \* \*

“The term ‘incontestable’ is of great breadth. It is the ‘policy’ which is to be incontestable. We think the language broad enough to cover all grounds for con-



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test not specially excepted in that clause. The word 'policy' may well be taken to mean a formal document delivered by the company, and containing evidence of an obligation to pay. Such a document so delivered is ordinarily contestable, with reference to questions arising in connection with its delivery and payment of the first premium, as well as with reference to statements contained in the application. \* \* \*

"The argument that the policy was not in continuous force is predicated upon an extrinsic fact not appearing upon the face of the policy, to wit, the fact that the assured was not in good health at the date of delivery of the policy. In setting up, or even in relying upon, this extrinsic fact, the company is contesting its policy as evidence of its obligation. If the company is at liberty to set up this fact after the lapse of more than five years, it is equally at liberty to set it up after the lapse of forty years. Instead of being an incontestable policy, if we adopt the defendant's argument, the policy is always contestable."

We unqualifiedly approve of the reasoning of the court in the aforesaid case. The language in the incontestable clause in the case at bar is clear and explicit, and unquestionably provided that after one year, the policy having been delivered and the first premium paid, said policy could not be avoided save for the ground specially reserved, viz., the failure to pay the premiums. To hold otherwise would utterly destroy the value of any incontestable clause.

The defendant further contends that even if said policies were in force, the incontestable clause had not yet taken effect, because plaintiff had not paid the second premiums at the end of the first year. The evidence shows, however, as already stated, that a tender of the premiums due on both these policies was made on January 4th, the insured evidently taking advantage of the provision in the policies permitting one month's grace in the payment of the premiums after the first, subject to an interest charge of five per cent. per annum. Defendant contends, however, that this act on the part

of the insured extended the application of the incontestable clause until after the tender of the premiums. In other words, defendant argues that while the period of incontestability is by the express terms of the policy one year, yet if the thirty days of grace on the payment of the premium is taken advantage of by the insured, the period of incontestability is thereby extended a corresponding period.

This provision whereby the payment of the premiums was extended thirty days must also be considered as an inducement for a person to become a policy holder and intended for his benefit. Moreover, there is a consideration for the extension, viz., the payment of five per cent. interest. There is nothing contained in the language of this provision which will permit of the construction contended for here by the defendant. Counsel depends entirely in his argument upon the fact that because the premium was not paid or tendered at the end of the first year, defendant had the right to refuse it when afterwards tendered, and that such refusal on its part was a notice that defendant intended to avoid said policies. The record is clear, however, that no affirmative act was taken by the defendant to avoid the policies until after the tender of the premiums, which was more than a year after the first premiums were paid and the policies delivered. In the stipulation entered into between the parties at the time of the trial, wherein it was agreed that the tender of the premiums had been made within the period of grace and refused by defendant, there was nothing stated that said refusal was based upon any reason advanced in the contentions of the defendant on this appeal. Moreover, the record shows that after both policies had been in force for more than a year, defendant, on December 30, 1911, wrote the insured reminding him that the period of grace was drawing to a close, that in order to save his insurance he should pay the premiums within that period.

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The writing of this letter was an act affirming the policy in question. In fact, nowhere does it appear in the record in this case that any action was taken by the defendant indicating a desire to terminate the policies, until after the tender of the premiums had been made—more than a year after the issuance of the said policies. We cannot, therefore, for any of the reasons advanced, concur in the contention of the defendant that the incontestable clause had not taken effect, but must hold the contrary.

There is the further contention that the court erred in refusing to admit in evidence the proof offered by defendant to show that the answers made by the insured to questions propounded in the applications for policies were false, and the insured having warranted his answers to be true, the insured thereby practiced a fraud, because of which the company had the right to avoid the policies. We having held that the incontestable clause had become effective, such defense was absolutely unavailing, and the evidence to establish the alleged fraud was clearly inadmissible.

Defendant's further contention that the court erred in instructing the jury to allow interest on plaintiff's claim is without merit. Finding no reversible error, the judgment will be affirmed.

*Affirmed.*

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**Thora L. Rathmann, Appellee, v. Charles H. Rathmann, Appellant.**

**Gen. No. 20,973. (Not to be reported in full.)**

Appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed December 8, 1915. Rehearing denied December 21, 1915.

### Statement of the Case.

Bill for separate maintenance by Thora L. Rathmann, complainant, against Charles H. Rathmann, defendant, in the Superior Court of Cook county. From a decree in favor of complainant, defendant appeals.

The decree for separate maintenance was based upon the charge of extreme and repeated cruelty, and that at the time of the decree she was living separate and apart from her husband without her fault. The decree further directed that complainant be allowed the use and occupancy of the dwelling house owned by defendant—then occupied by complainant and her minor children as well as by the defendant—together with all personal property, goods, chattels and effects contained therein; that she also be allowed the use of the building used by defendant as a garage, and seventy-five dollars per month alimony. It also awarded to complainant the custody of the two children, and further ordered said defendant to vacate the room occupied by him in said dwelling house and that he move therefrom.

Complainant's bill was filed in June, 1913, wherein it was alleged that she was married to defendant in December, 1907; that she continued to cohabit with him until May 10, 1913; that they had two children, one five years old and the other sixteen months; that complainant discharged her duties as wife while she lived with defendant, but that defendant, a short time after marriage, commenced a course of cruel, unkind and inhuman conduct toward her, which continued until on or about May 10, 1913, at which time she was compelled to cease her relation with defendant as a wife, although she continued to live under the same roof; that because of defendant's extreme and repeated

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cruelty it is unsafe and improper for her and the children to live with him.

Complainant by her testimony showed that she and the defendant had been living as husband and wife in said dwelling house up to May 10, 1913; that thereafter, because of alleged inhuman treatment on his part, she ceased sustaining the marital relationship with him, although continuing to live under the same roof, each occupying a separate room. While the bill charges failure to properly support complainant, the record is barren of any evidence tending to show that complainant was ever without the necessities of life. At the time the bill was filed she was living in a home provided by the defendant, and one deemed suitable for them to live in. While there was some dispute as to whether or not the support given her by defendant was suitable and adequate to their condition in life, yet she had the necessities of life and had the service of a maid up to the time said bill was filed. The only evidence that complainant and defendant were living separate and apart was the testimony that from May 10th, when the complainant ceased living with him as his wife because of cruelty, to June 10th, the date of the filing of her bill for separate maintenance, the complainant and defendant, while living under the same roof, occupied separate rooms. There was no evidence as to whether or not during this period the parties ate at the same table or met in the family living room or that in any way the relationship was changed, save the fact that they did not occupy the same room.

CANTWELL & SMITH and CAREY W. RHODES, for appellant.

CHARLES E. ERBSTEIN and ROBERT R. JAMPOLIS, for appellee.

MR. JUSTICE PAM delivered the opinion of the court.

### **Abstract of the Decision.**

1. HUSBAND AND WIFE, § 267\*—*necessity that decree of separate maintenance be supported by evidence that parties were living apart.* In an action for separate maintenance, a decree in favor of the wife cannot stand unless it appears reasonably as a fact that at the time the bill was filed the parties were actually living separate and apart.

2. HUSBAND AND WIFE, § 267\*—*when evidence insufficient to establish that parties were living apart.* In an action for separate maintenance, a finding that at the time the bill was filed the parties were living separate and apart, *held* not sustained by the evidence where the record shows that at such time the parties were living in the same house, but where there is no evidence in the record tending to show that their relations were changed further than the fact that they did not occupy the same room.

3. HUSBAND AND WIFE, § 257\*—*when bill for separate maintenance sufficiently alleges that parties were living apart.* In an action for separate maintenance, allegations in the bill examined and *held* sufficiently to allege that at the time the bill was filed the parties were living separate and apart, in the absence of a special demurrer to such allegations, although such facts are not clearly alleged therein.

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### **Siegmund Roesner, Appellee, v. C. E. Dellenbarger Company, Appellant.**

**Gen. No. 21,003. (Not to be reported in full.)**

Appeal from the County Court of Cook county; the Hon. DAVID T. SMILEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed December 8, 1915.

### **Statement of the Case.**

Action by Siegmund Roesner, plaintiff, against the C. E. Dellenbarger Company, defendant, in the County Court of Cook county, to recover on a contract of employment. From a judgment for plaintiff for \$400, defendant appeals.

The contract sued on is as follows:

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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“Know all Men by these Presents, that C. E. Dellenbarger Company, a corporation, hereinafter called first party, and Siegmund Roesner, hereinafter called second party, both of Chicago, Cook County, Illinois, entered into the following agreement, this 15th day of October, 1912:

“First party agrees to hire the services of second party for the period of one year, beginning on the 15th day of October, 1912, and ending on the 14th day of October, 1913, for the following purposes:

“(1) Second party is to work in the machine shop of first party, and do all mechanical work, such as experimental, model, tool and die, and all work required by the trade of the company, in a first-class manner and workmanship.

“(2) If so directed by first party, second party is to superintend the work done in the shop of first party, and take charge of the working force.

“(3) Second party is to use his best knowledge and ability in discharging the duties assigned to him by first party.

“(4) In consideration of the foregoing, first party agrees to pay the second party the sum of Eighteen Hundred and fifty (\$1,850.00) dollars per annum, payable in weekly installments, as follows:

“30.00 per week for each and every week, for a period covering the first three months, beginning on the 15th day of October, 1912; thereafter, \$35.00 per week for each and every week, for a period covering the second three months, beginning on the 15th of January, 1913, and \$37.50 per week for every week for the remainder of six months of this contract, beginning on the 15th day of April, 1913.

“(Signed) C. E. DELLENBARGER Co.,

“By C. E. Dellenbarger, Pres.

“S. ROESNER.”

The evidence showed that plaintiff entered upon the employment immediately after the making of said contract, and continued until August 20, 1913, when he was discharged by the defendant; that plaintiff



received during that period the sum of \$1,360 from the defendant.

The principal issue was whether or not there were sufficient grounds justifying the discharge of the plaintiff before the expiration of the year for which he had been employed. On this issue there was only one witness for the plaintiff and that was the plaintiff himself, who testified that during the time he was working under said contract he in every respect complied with the terms thereof; that on the 20th day of August, 1913, he was discharged by the president of defendant, without cause; that thereafter he sought employment elsewhere during the remainder of the term of the contract, but without success.

Defendant, by three witnesses, offered testimony tending to show that plaintiff had repeatedly failed to comply with directions given him by his superiors as to the manner in which to perform his work, wherefore he was discharged. Plaintiff, however, denied ever having received any such directions, save at the time he was discharged.

WEST & ECKHART, for appellant.

No appearance for appellee.

MR. JUSTICE PAM delivered the opinion of the court.

### **-Abstract of the Decision.**

1. EVIDENCE, § 476\*—*when number of witnesses may be considered in weighing evidence.* The number of witnesses testifying on each side in the trial of an action is a proper but not an absolutely controlling element to be considered by the jury in weighing the evidence.

2. WITNESSES, § 253\*—*province of jury as to credibility of witnesses.* It is the province of the jury to determine the credibility of witnesses and the weight to be given their testimony.

3. APPEAL AND ERROR, § 1410\*—*when verdict not disturbed as against weight of evidence.* Unless the verdict of a jury is clearly

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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and manifestly against the weight of the evidence, such verdict will not be disturbed on review.

4. **NEW TRIAL, § 97\***—*necessity of affidavits to support motion for new trial on ground of newly-discovered evidence.* A motion for a new trial on the ground of newly-discovered evidence must be supported by the affidavits of the witnesses by whom it is proposed to prove the matters relied upon, or an excuse shown for not producing such affidavits.

5. **NEW TRIAL, § 102\***—*when affidavit supporting motion for new trial on ground of newly-discovered evidence insufficient.* On a motion for a new trial on the ground of newly-discovered evidence, an affidavit that the witness by whom the party seeking the new trial proposed to prove the matters relied upon as newly-discovered evidence is beyond the reach of the affiant, and further alleging that affiant made "earnest efforts" to secure an affidavit from such witness, is insufficient in that such affidavit does not state specific facts sufficient to enable the court to determine what efforts were made by affiant to secure such affidavit before the witness' departure.

6. **NEW TRIAL, § 102\***—*when affidavit supporting motion for new trial on ground of newly-discovered evidence insufficient.* On a motion for a new trial on the ground of newly-discovered evidence, an affidavit that prior to and during the trial affiant made "diligent efforts \* \* \* to discover evidence" of the character relied on as newly-discovered evidence, is insufficient in that its allegations are mere conclusions of the affiant and give the court no information from which it can determine whether or not affiant was diligent.

7. **TRIAL, § 155\***—*when weight of evidence jury question.* Where the evidence is conflicting, a question of fact for the jury is presented.

8. **CONTRACTS, § 384\***—*sufficiency of evidence to sustain verdict.* In an action to recover on a contract whereby defendant agreed to employ plaintiff at a stated rate of compensation for a named period, in which the defense was that the contract was somewhat modified with the assent of plaintiff, a verdict whereby the jury found that plaintiff never assented to such modification of the contract, *held* not manifestly against the weight of the evidence.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Mutual Life Ins. Co. of N. Y. v. Ritscher et al., 196 Ill. App. 27.

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**Mutual Life Insurance Company of New York v.  
Louise H. Ritscher and Herbert Hammond.**

**On Appeal of Louise H. Ritscher, Appellant, v. Herbert  
Hammond, Appellee.**

**Gen. No. 21,019.**

1. FRAUDS, STATUTE OF, § 25\*—*when test as to possibility of time of performance governs.* The test whether a contract is within the Statute of Frauds is whether at the time such agreement was made it could have been performed within a year, and not whether in fact such contract was so performed, and hence, if performance within one year was possible, the contract is not within the statute.

2. FRAUDS, STATUTE OF, § 25\*—*when applicable to contract not to be performed in a year.* A contract is within the Statute of Frauds if by its terms it appears that the contract cannot be performed within one year from the time when the contract was made.

3. FRAUDS, STATUTE OF, § 25\*—*when expectation of parties as to time of performance not controlling.* An assignment of a policy of life insurance to secure moneys then due, or which in the future might be due from insured to assignee, is not within the Statute of Frauds, although such contract fixes no definite time during which it is to continue in force, and although it appears from the contract that parties contemplated that it would continue in force for more than a year, for the reason that such a contract is not within the statute if by a reasonable construction its terms did not require it to remain in force for more than a year.

4. INTERPLEADER, § 8\*—*what essential.* In a bill of interpleader, both claimants are in a position similar to that of plaintiff in possessory actions, where plaintiff must recover on the strength of his own title, and not on the weakness of the title of his adversary.

5. INTERPLEADER, § 17\*—*when evidence insufficient to support decree.* In an interpleader suit brought by an insurance company to determine the rights of claimants to a fund arising under a policy issued by complainant and on which liability was admitted, where defendants claimed the fund respectively as the beneficiary named in the policy, and as assignee thereof, under an assignment made by insured in his lifetime, evidence examined and a decree finding the equities in favor of defendant claiming as assignee *held* erroneous under the evidence.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Mutual Life Ins. Co. of N. Y. v. Ritscher et al., 196 Ill. App. 27.

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Appeal from the Circuit Court of Cook county; the Hon. JOHN P. McGOORTHY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded with directions. Opinion filed December 8, 1915. *Certiorari* denied by Supreme Court (making opinion final).

MONTGOMERY, HART, SMITH & STEERE, for appellant.

JOHN P. AHRENS, for appellee.

MR. JUSTICE PAM delivered the opinion of the court.

Appellant and appellee were defendants in a bill of interpleader filed by the Mutual Life Insurance Company of New York, hereinafter referred to as the complainant, to determine to whom should be paid the net proceeds of a life insurance policy issued by it on the life of Edward C. Ritscher, the deceased husband of the appellant, hereinafter referred to as the assured. Answers having been filed by both the appellant and the appellee, the court entered an interlocutory decree wherein it directed, *inter alia*, that the complainant pay into court the sum of \$8,434.83, being the net proceeds due upon the said policy after deducting the amount of a loan which had been made to the assured by the complainant; and that upon payment of said amount to the clerk of the court, complainant be dismissed from further prosecution of its bill and released of all claims under said policy of insurance.

The sole controversy here presented is, whether the appellant or the appellee is entitled to the proceeds of this policy, appellant claiming as beneficiary under the policy, and appellee by virtue of an assignment to him executed by appellant and the assured. This issue was referred to a master who found the equities with the appellee and recommended that a decree be entered directing the clerk of the court to pay the proceeds of the policy (\$8,434.83) to the appellee. Upon a hearing, the court entered a decree as recommended, and from this decree appellant has prosecuted this appeal.

The evidence discloses that on April 23, 1900, the

complainant issued a policy of insurance on the life of the assured, in the sum of \$10,000, payable to the appellant, her executors, administrators and assigns; that on September 28, 1903, appellant and the assured executed an assignment of said policy to the appellee and delivered the same to him. Appellee testified that same were delivered as collateral security for debts then owing or which might in the future be owing by the assured to him; that when such arrangement was made, he believed appellant was present; that during November, 1908, the assured desired to make a loan on said policy from the complainant and requested him (appellee) to deliver the policy to complainant; that "Mr. Ritscher said he would borrow what money he could from the insurance company and allow the assignments to remain with me, in the same manner as they were before;" that the money received on this loan was to be paid to appellee.

The evidence further discloses that complainant made a loan on said policy in the sum of \$1,330, the net proceeds of which (\$1,303.58) were sent to appellee by check payable to the order of appellant and the assured, and that the appellee in turn inclosed the check in a letter to the appellant and the assured, with a request to indorse the check and return it to him, which was done; that the assured died on June 2, 1910, upon which date the policy was in full force and effect; that after deducting the amount due complainant upon the aforementioned loan, there was a balance due on the policy of \$8,544.83; that within a few days after the death of the assured, appellee notified complainant that he claimed the full amount of said policy, and exhibited the assignment previously referred to and left same with it as evidence of his right to the said fund; that at the time of his death, the assured was indebted to appellee on notes and checks in a sum greater than the amount due on said policy; that these

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notes were collateral notes; that though security was recited therein they did not mention the insurance policy in question or any other insurance policy; that these notes and checks aggregated more than the amounts actually advanced by the appellee to the assured.

These notes bore six per cent. interest, but there was evidence that commissions were paid by the assured to appellee to secure these loans. The exact amount of these commissions does not appear in the evidence, appellee testifying that he kept no books of the commissions paid; that while a memorandum was made at that time, no permanent record was kept thereof. The master found that the commissions were large in amount.

There were also offered in evidence several letters passing between the assured and appellee, all of them having to do with loans being made by appellee to the assured. Among these was one dated April 11, 1910, wherein appellee, after making reference to several of their business transactions, wrote as follows:

“I have thought recently of the importance of your life in the most of the matters in which you and I are now or likely to be interested, and that it would be wise to have an assignment of some of your policies of insurance covering about such an amount as is wise to have an assignment of some of your policies which I once held removed this factor which has not been replaced. I understand that these particular policies are deposited with the companies issuing them, but dare say you have others that are not so deposited.”

It further appeared from the evidence that there had also been deposited with appellee a policy on the life of the assured, issued by the State Mutual Life Insurance Company, which had also been delivered to the issuing company, to be used, as appellee testi-

fied, "as the basis of a loan to Mr. Ritscher." That transaction took place in December, 1908.

Appellant, in her answer and upon the trial of the case, admitted the making of the assignment. She claims, however, that whatever interest appellee had by virtue of this assignment, it was released at the time said policy was delivered to the complainant at the request of the assured, for the purpose of securing a loan, the proceeds of which were paid to appellee. She also contends that the agreement whereby this policy and assignment were delivered as collateral security for debts owing and to be owing in the future, being an oral one, it must, under the evidence, be considered as a contract not to be performed within one year from the date thereof, and therefore void under the Statute of Frauds.

In urging this latter contention, appellant asserts that there is no evidence in the record to show what indebtedness, if any, was existing at the time the policy and the assignment were delivered as collateral security, viz., in 1903; that while appellee testified that there were continual transactions between himself and the assured from that time to the latter's death on June 2, 1910, yet the only evidence of indebtedness in the record was in the form of notes and checks issued during May and June, 1910; that therefore the appellee's claim being dependent upon an indebtedness which the evidence discloses arose more than a year after the making of the agreement, such agreement was void under the Statute of Frauds because it was not performed within one year. However, the test to determine whether such agreement comes within the statute is not whether it was performed within a year, but whether, when the agreement was made, it could have been performed within a year; and if so, it does not come within the statute. A contract comes within the Statute of Frauds if by its terms it appears that it cannot be performed within one year from the date of

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making thereof. This principle is well set forth in *Warner v. Texas & P. Ry. Co.*, 164 U. S. 418, wherein the court said (p. 433):

“In the case at bar, the contract between the railroad company and the plaintiff, as testified to by the plaintiff himself, who was the only witness upon the point, was that if he would furnish the ties and grade the ground for the switch at the place where he proposed to erect a sawmill, the railroad company would ‘put down the iron rails and maintain the switch for the plaintiff’s benefit for shipping purposes as long as he needed it.’

“The parties may well have expected that the contract would continue in force for more than one year; it may have been very improbable that it would not do so; and it did in fact continue in force for a much longer time. But they made no stipulation which in terms, or by reasonable inference, required that result. The question is not what the probable, or expected, or actual performance of the contract was, but whether the contract, according to the reasonable interpretation of its terms, required that it should not be performed within the year. No definite term of time for the performance of the contract appears to have been mentioned or contemplated by the parties; nor was there any agreement as to the amount of lumber to be sawed or shipped by the plaintiff, or as to the time during which he should keep up his mill. \* \* \*

“If, within a year after the making of the contract, the plaintiff had died, or had abandoned his whole business at this place, or for any other reason had ceased to need the switch for the shipping of lumber, the railroad company would have been no longer under any obligation to maintain the switch, and the contract would have been brought to an end by having been fully performed.

“The complete performance of the contract depending upon a contingency which might happen within the year, the contract is not within the statute of frauds as an ‘agreement which is not to be performed within the space of one year from the making thereof.’ ”



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Such also is the holding in *Walker v. Johnson*, 96 U. S. 424; *McPherson v. Cox*, 96 U. S. 404; *Birks v. Gillett*, 13 Ill. App. 369; *Hulse v. Hulse*, 155 Ill. App. 343.

If under this agreement a loan had been made at the time the policy and assignment were delivered, or within a year thereafter, and within a year after the loan had been made, and the assured had died, then whatever moneys were due under said policy could have been claimed as security by appellee for the loans made by him under said agreement. It matters not that from the contract itself the parties contemplated that the contract was to continue in force for a period of more than one year, if by a reasonable interpretation its terms did not require it to be in force for a period of more than one year. We are therefore of the opinion that the said agreement was not within the Statute of Frauds.

This brings us to the contention of appellant, that when said policy was delivered by appellee to the complainant to enable the assured to make a loan, the proceeds of which was to be paid, and actually was paid, to the appellee, that thereby the appellee released all his interest in said policy that had accrued to him under the aforementioned assignment.

In this proceeding, being a bill of interpleader, the two claimants, viz., the appellant and the appellee, are in a position similar to that presented in *Conway v. Caswell*, 121 Ga. 254, 48 S. E. 956, wherein it was said (p. 259):

“In interpleaders both claimants are in a position similar to that of plaintiffs in other possessory actions, where the recovery must be on the strength of their own title rather than on the weakness of their adversary’s title.”

Both the appellant and the appellee assert that under the evidence they are entitled to the money due under the policy.



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The policy and the assignment were delivered to appellee in 1903. The policy remained in his possession until 1908. During the interim, it was kept in force and the premiums paid, presumably by the assured; at least, it is certain that appellee did not pay them. In 1908, appellee states, the assured came to him and requested that the policy be delivered to the complainant so he (the assured) might secure a loan thereon. There is no evidence as to why he wished to secure this loan. It is fair to presume, however, that it was for the benefit of appellee, because he received the proceeds thereof. There is no evidence as to the exact state of indebtedness at that time. At the time of his death, the evidence of indebtedness, upon which appellee bases his claim, were the notes and checks made in May and June, 1910. These notes were collateral notes, and the collateral was therein set out in full, yet no mention is made therein of either of the insurance policies; in fact, the record is barren of any written evidence wherein it appears that either of these policies was held as collateral security.

Appellant insists that these facts and the reasonable inferences that flow therefrom show that the appellee released all claims he had had by virtue of the assignment, and that this is further evidenced by the letter of April 11, 1910, written by appellee to the assured, wherein he said:

“I have thought recently of the importance of your life in the most of the matters in which you and I are now or likely to be interested and that it would be wise to have an assignment of some of your policies of insurance covering about such an amount as is likely to be involved. The taking away of the policies which I once held removed this factor which has not been replaced. I understand that these particular policies are deposited with the companies issuing them, but dare say you have others that are not so deposited.”

While the master found that said letter did not release or was not any evidence of an intention on the

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part of the appellee to release his right in and to the policy in question, we cannot concur in such finding. There is no question that appellee, to secure loans then existing or to be made in the future, was endeavoring by this letter to obtain from the assured as collateral security an assignment of any policies which the assured might have, other than the policies which had been in his possession, among which was the policy in question. When appellee states therein that "the taking away of the policies which I once held removed this factor which has not been replaced," he can have reference only to the policy in question and the one issued by the State Mutual Life Insurance Company already referred to, because the record is barren of any evidence indicating that he had reference to any other policies. What was the factor that was removed? Policies or assignments to secure any transactions he had or might have had with the assured. And when appellee states further, "I understand that these particular policies are deposited with the companies issuing them, but daresay you have others that are not so deposited," such language can only be construed to mean that the appellee regarded his rights in and to said policies gone after they had been deposited with the complainant and the other insurance company. There was no evidence of any limitation upon the right of the assured to deal with the policy as he saw fit. It was in his power, for aught that appears in the record, to absolutely dispose of his right, title and interest in this policy. In fact, complainant's bill alleged that *the assured deposited with it the policy in question as collateral security* for a loan of \$1,330, and the interlocutory decree so found.

Upon what does appellee base his contention that he still retained his interest in said policy, subject only to the loan made by the complainant? First, upon the fact that he retained the assignment, and further, on a conversation with the assured,—whose lips are now

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closed forever, and were at the time of the trial,—that when he delivered this policy to the complainant at the request of the assured, the latter stated that “he would borrow what money he could from the insurance company and allow the assignments to remain with me in the same manner they were before.” That is the only evidence in the record to support his contention. There is no evidence of any positive act on his part to show, or tending to show, that he still considered this policy as collateral security. On the contrary, the letter of April 11, 1910, clearly showed that he no longer regarded these policies as a *factor* with reference to his business transactions with the assured. His explanation of that letter upon the trial was far from satisfactory. In fact, the record is barren of any evidence which shows that complainant had any notice whatever of the alleged claim of appellee in and to the said policy prior to the death of the assured. On the contrary, the record shows that complainant held the policy subject only to the right of the assured and the appellant.

Manifestly, to our minds, the entire course of conduct as evidenced by these facts, which are undisputed, indicates that the appellee did not rely any further upon the policy in question but had in fact released all his rights and interest therein, the consideration for his doing so being the fact that he received the entire proceeds of the loan made by complainant to the assured.

We are therefore of the opinion that the chancellor erred in finding the equities with the appellee, and that under the evidence the finding should have been for the appellant. The decree must, therefore, be reversed.

The order of this court will be that the decree be reversed and the cause remanded with directions to the chancellor to enter a decree finding the equities with the appellant.

*Reversed and remanded with directions.*

**City of Chicago, Defendant in Error, v. Charles Lesser,  
Plaintiff in Error.**

**Gen. No. 20,211. (Not to be reported in full.)**

Error to the Municipal Court of Chicago; the Hon. FREDERICK L. FAKE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed December 21, 1915.

**Statement of the Case.**

Action by the City of Chicago in the Municipal Court against Charles Lesser, defendant, to recover a penalty for violation of an ordinance. To reverse a judgment imposing a fine of \$200 and costs of \$8.50, defendant prosecutes this writ of error.

GEORGE REMUS, for plaintiff in error.

JOHN W. BECKWITH and ALBERT J. W. APPELL, for defendant in error; JOHN F. POWER, of counsel.

MR. JUSTICE McGOORTY delivered the opinion of the court.

**Abstract of the Decision.**

1. MUNICIPAL COURT OF CHICAGO, § 13\*—*when complaint for violation of ordinance sufficient.* A complaint charging defendant with a violation of an ordinance of the City of Chicago relative to gaming sufficiently describes the offense charged and the ordinance alleged to have been violated where such complaint describes the ordinance violated by the number of its section of the Chicago Municipal Code, and where the acts charged against defendant are also specifically set forth therein.

2. APPEAL AND ERROR, § 1034\*—*when Appellate Court will not take judicial notice of ordinances.* In order to take advantage on review of points based on ordinances of the City of Chicago, such ordinances must be preserved in the bill of exceptions, as the Appellate Court will not take judicial notice of such ordinances.

3. APPEAL AND ERROR, § 1302\*—*when presumed trial court took judicial notice of ordinance.* In an action to recover a penalty for violation of an ordinance of the City of Chicago, where on writ

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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City of Chicago v. Coorth, 196 Ill. App. 38.

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of error to reverse the judgment the record fails to show whether the trial judge took judicial notice of the ordinance in question as required by section 54 of the Municipal Court Act (J. & A. ¶ 3371), the Appellate Court will presume that the statute was complied with.

4. MUNICIPAL COURT OF CHICAGO, § 18\*—*when motion for rule requiring filing more specific statement necessary in action for penalty.* In an action to recover a penalty for violation of a city ordinance relative to gaming, where the complaint is objected to as being indefinite, defendant's remedy is to move for a rule to require plaintiff to file a more specific statement as in other cases of the fourth and fifth classes under the Municipal Court Act, as such an action is a civil action and the complaint therein stands as a statement of plaintiff's claim.

5. GAMING, § 43\*—*when evidence sufficient to sustain judgment.* In an action to recover a penalty for violation of an ordinance of the City of Chicago, relative to gaming, a judgment for plaintiff, held not manifestly against the weight of the evidence.

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**City of Chicago, Defendant in Error, v. Otto Coorth,  
Plaintiff in Error.**

**Gen. No. 20,210. (Not to be reported in full.)**

Error to the Municipal Court of Chicago; the Hon. FREDERICK L. FAKE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed December 21, 1915.

**Statement of the Case.**

Action by the City of Chicago against Otto Coorth, defendant, in the Municipal Court of Chicago, to recover a penalty for violation of section 2012 of the Chicago Code of 1911. This case presents the same questions of law raised in *City of Chicago v. Lesser*, No. 20,211, *ante*, p. 37, and a judgment for plaintiff in this case was affirmed on the authority of that case.

GEORGE REMUS, for plaintiff in error.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

O'Brien v. Newhouse, 196 Ill. App. 39.

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JOHN W. BECKWITH and ALBERT J. W. APPELL, for defendant in error; JOHN F. POWER, of counsel.

MR. JUSTICE MCGOORTY delivered the opinion of the court.

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**J. F. O'Brien, trading as J. F. O'Brien & Company,  
Plaintiff in Error, v. H. L. Newhouse,  
Defendant in Error.**

**Gen. No. 20,631. (Not to be reported in full.)**

Error to the Municipal Court of Chicago; the Hon. HARRY C. MORAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed December 21, 1915.

### **Statement of the Case.**

Action by J. F. O'Brien, trading as J. F. O'Brien & Company, plaintiff, against H. L. Newhouse, defendant, in the Municipal Court of Chicago, to recover the amount of broker's commissions for negotiating leases of defendant's property. Defendant, in addition to an affidavit of merits, filed set-off. The court found the issues against plaintiff and for defendant on his set-off and assessed defendant's damages on his set-off at eight dollars.

The controverted questions arise as to two leases, known as the "Daube" and "Berger" leases. The only evidence as to the Daube lease was the testimony of plaintiff and defendant, plaintiff claiming and defendant denying that plaintiff procured such lease. As to the Berger lease it appeared that plaintiff negotiated with Berger to induce him to take a lease of defendant's store, but Berger declined, whereupon plaintiff abandoned further negotiations with Berger after noti-

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O'Brien v. Newhouse, 196 Ill. App. 39.

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fyng defendant of such negotiations. It further appeared that several weeks later another broker began negotiations with Berger in regard to a lease of the same store, as a result of which Berger changed his mind and took the lease, on terms which were different from those proposed by plaintiff, but it did not appear whether the new terms were more or less favorable to Berger. It did not appear that plaintiff had anything to do with Berger's change of mind. The cause was tried by the court, which found the issues against plaintiff and in favor of defendant on his set-off, and assessed defendant's damages at eight dollars. To reverse a judgment for defendant for eight dollars, plaintiff prosecutes this writ of error.

P. H. BISHOP, for plaintiff in error.

ADLER & LEDERER, for defendant in error.

MR. JUSTICE McGOORTY delivered the opinion of the court.

### Abstract of the Decision.

1. **BROKERS, § 93\***—*when question whether broker procuring cause of renting premises for jury.* In an action to recover a broker's commission for negotiating the rental of property, the question whether plaintiff's services was the procuring cause and the effective means of bringing about such renting of the property is a question of fact for the jury on all the evidence.

2. **BROKERS, § 51\***—*what is effect on right to compensation of other broker being procuring cause of obtaining tenant.* The fact that plaintiff, a broker, had formerly negotiated with a person in regard to such person's taking a lease of defendant's store does not warrant a claim for a commission by plaintiff for bringing about such lease, where it appears that such person was finally induced to take such lease through the efforts of another broker after plaintiff had for some time abandoned negotiations with such lessee in regard to his taking the lease.

3. **BROKERS, § 37\***—*when broker not procuring cause of lease.* Where a broker negotiates with a person to induce him to take a lease, which such person then refuses to do, upon which plaintiff abandons further negotiation with such person in regard to his tak-

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Rumszas v. Chicago R. I. & P. Ry. Co., 196 Ill. App. 41.

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ing such lease, such broker cannot be said to be the procuring cause of making the lease, so as to entitle him to recover a commission therefor, where such person later changes his mind and takes the lease, in the absence of evidence that plaintiff induced such person to change his mind with reference to taking such lease.

4. **BROKERS, § 90\***—*when evidence sufficient to sustain finding that broker not procuring cause of lease.* In an action to recover a broker's commission for procuring a lease of defendant's property, where plaintiff, a broker, negotiated in regard to such lease with a person who at first refused, and who, after plaintiff had abandoned such negotiations, changed his mind and took the lease, a finding that plaintiff did not procure or induce such person to take the lease *held* not manifestly against the weight of the evidence.

5. **BROKERS, § 72\***—*when judgment properly entered on set-off in action for commissions.* In an action to recover a broker's commission for procuring a lease of defendant's property, where defendant filed set-off, and the action was tried by the court, judgment for defendant on his set-off *held* not erroneous as ignoring the issues joined on plaintiff's claim, where it appears that the trial court after hearing the issues raised both on plaintiff's claim and defendant's set-off, and overruling plaintiff's motion for a finding in his favor, and finding that plaintiff was indebted to defendant entered the judgment complained of, for the reason that such action of the trial court was proper under section 47 of the Practice Act (J. & A. § 8584), providing that where it appears on the trial of an action that plaintiff is indebted to defendant, the jury shall find for defendant and shall certify to the court the amount so found, which shall enter judgment for defendant, and further, that where the cause is tried by the court, the finding in judgment shall be in like manner.

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**Frank Rumszas, Appellee, v. Chicago, Rock Island & Pacific Railway Company, Appellant.**

**Gen. No. 20,821. (Not to be reported in full.)**

Appeal from the Superior Court of Cook county; the Hon. MAZZINI SLUSSER, Judge, presiding. Heard in the Branch Appellate Court at the February term, 1915. Reversed with finding of fact. Opinion filed December 21, 1915.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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### Statement of the Case.

Action of trespass by Frank Rumszas, plaintiff, against the Chicago, Rock Island and Pacific Railway Company, defendant, to recover for personal injuries alleged to have been sustained by plaintiff as a result of an assault committed on plaintiff by an employee of defendant. From a judgment for plaintiff for \$1,000, defendant appeals.

The alleged assault occurred on April 21, 1911. Defendant introduced in evidence a paper purporting to be a general release under seal, executed by plaintiff for \$36, on May 2, 1911, and also introduced a draft, of the same date, payable to the order of plaintiff for \$36, which draft on its face recites: "For personal injuries received at Chicago, Illinois, on April 21, 1911." The alleged release recites that plaintiff released defendant from all liability, for all claims for injuries, etc., plaintiff acknowledging therein full satisfaction.

The plaintiff contended that he was induced, by agents of the defendant, by trick or fraud, to sign said release under the belief that it was a receipt for money in payment of wages due him at the time of the happening of the injuries complained of. The plaintiff at the time of the said assault was in the employ of the defendant as a car cleaner.

The plaintiff testified that he could not read English; that the paper constituting the purported release was presented to him by two agents of the company at the hospital, but was not read to him before he signed it; that "Mr. Shaw (one of the defendant's agents) took a pencil and say 'Sign your name on the paper,' and I signed that, and he has a check for me and he gave me that check, and the two men put the paper in their pocket. He said that is a good thing, you get wages in pay for it, don't lose that. \* \* \* The paper (the check) they gave me I kept it one day, and then \* \* \*

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I gave it to my wife. \* \* \* I do not know what a release is. \* \* \* At the time I signed the release I thought it was for wages I had coming. \* \* \* At the time I was injured I had twenty-one days coming, and I thought that the check that Emmick gave me was for that money. After while I got the money I had coming for the twenty-one days \* \* \* .” The plaintiff, in part, testified through an interpreter.

Within a few days following the execution by plaintiff of said release and before he cashed said draft, he admitted that he was informed by Dr. Schultze, of the hospital, that he had signed a release “for his injuries.” He subsequently was paid by defendant the amount due him as wages for said twenty-one days. The check or draft given him May 2, 1911, when he signed such release, charged plaintiff with notice that it was given to and accepted by him in settlement of his claim. The draft is on a printed form with the following words legibly written on its face: “For personal injuries received at Chicago, April 21, 1911,” and was not cashed until May 10, 1911. The proceeds of such draft were retained by him, and no offer was ever made by plaintiff to return, to the defendant, the money thus received.

It appeared that defendant’s agent visited plaintiff at the hospital where plaintiff was taken after receiving the injuries sought to be recovered for, where the release was signed and the draft in question delivered. It did not appear that plaintiff was informed by the agent that the release was a receipt for money due plaintiff for wages.

M. L. BELL and A. B. ENOCH, for appellant.

EARL J. WALKER, for appellee.

MR. JUSTICE McGOORTY delivered the opinion of the court.

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### Abstract of the Decision.

1. **RELEASE, § 24\***—*when burden on plaintiff to show fraud in procurement of release.* Where the defense to an action is grounded on a release under seal, plaintiff has the burden of showing fraud in the procurement of such release, since a release cannot be avoided at law except for fraud in its execution.

2. **RELEASE, § 18\***—*when one signing release chargeable with notice that draft intended as settlement.* In an action to recover for personal injuries alleged to have been sustained as a result of an assault committed on plaintiff by an employee of defendant, where at the time of signing a release under seal plaintiff was not informed that the paper he signed was a release, but, in consideration of signing such release, plaintiff was given a draft payable to the order of plaintiff, on the face of which was legibly written: "For personal injuries received at Chicago, April 21, 1911," plaintiff *held* chargeable with notice that such draft was given and accepted in settlement of his claim, it appearing that before the draft was cashed plaintiff was informed that the paper he signed was a release of his claim for damages, it also appearing that after cashing the draft plaintiff retained its proceeds without making an offer to return such proceeds to defendant.

3. **RELEASE, § 8\***—*what fraud will avoid release.* In order to avoid a release given in settlement of a claim on the ground of fraud without returning or offering to return the money paid to secure the release, the fraud relied on must be an actual, intended fraud.

4. **RELEASE, § 27\***—*when evidence sufficient to show ratification of settlement.* In an action of trespass to recover for personal injuries alleged to have been sustained by plaintiff as a result of an assault committed on plaintiff by an employee of defendant, where the defense was grounded on a release under seal executed by plaintiff, and although there was no evidence that at the time of signing such release plaintiff knew that it was such, it appearing that plaintiff received and cashed a draft payable to his order showing on its face that such draft was given in settlement of the claim for which the release was asked, and that plaintiff retained the proceeds of such draft without an offer to return them to defendant, *held* that the evidence showed that plaintiff ratified the settlement.

5. **RELEASE, § 27\***—*when evidence sufficient to show lack of fraud in procurement of release.* In an action of trespass to recover for personal injuries alleged to have been sustained by plaintiff as a result of an assault committed on plaintiff by an employee of defend-

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ant, where the defense was grounded on a release under seal executed by plaintiff, which release was alleged to have been procured by fraud, evidence *held* to show that no fraud was practiced in procuring the release.

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**Page V. Lyon, Trustee, Appellant, v. Pony Moore et al.  
(Defendants), Joseph Marshall et al., Appellees.**

**Gen. No. 20,902. (Not to be reported in full.)**

Appeal from the Superior Court of Cook county; the Hon. JOHN M. O'CONNOR, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed December 21, 1915.

### **Statement of the Case.**

Bill by Page V. Lyon, trustee of the estate of Pony Moore, bankrupt, complainant, against Pony Moore *et al.*, defendants, to reach the interest of defendant Pony Moore, in a certain lease. From a decree finding defendant Frank Marshall liable for one month's rent, complainant appeals. The principal facts in this case up to June 18, 1913, are to be found in *Lyon v. Moore*, 259 Ill. 23.

Pony Moore was adjudged a bankrupt on August 12, 1907, on his petition, and Page V. Lyon, appellant, was appointed trustee. Moore was the lessee of certain premises from Mrs. Fowler, and he sublet them for the entire remainder of the term from November 1, 1905, to Joseph Marshall, who afterwards assigned the sublease to Frank J. Marshall. Moore retained no reversion in himself, but while he was liable to Mrs. Fowler for only \$100 a month, the rent reserved to him in the sublease was \$150 a month, so that the lease was worth to him \$50 a month for the remainder of the term. After a judgment for \$18,000 had been rendered against Moore, he and a certain Blunk devised a fraud-

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ulent scheme to defraud the creditor by putting that \$50 a month beyond his reach, and to carry the scheme into effect Moore surrendered the original lease. Marshall, as assignee of Moore's lease, was liable to Mrs. Fowler for \$100 a month as rent, and Moore had a contract right to the additional \$50 a month rent which Marshall was to pay. The Supreme Court held that the record showed a liability to said appellant from the lessee under the sublease in question, from the time the bill was filed and process served on such lessee, but that the record did not contain facts from which such liability could be determined, and reversed the judgment of the Appellate Court and the decree of the Superior Court, and remanded the cause to the Superior Court, with directions to enter a decree requiring every person liable, as lessee, for the rent of the premises during the existence of the lease after service of process on Joseph Marshall and Frank Marshall to account for and pay to appellant, as trustee in bankruptcy for Pony Moore, \$50 per month reserved to Moore by the agreement.

In pursuance to said remanding order and opinion of the Supreme Court, the case was redocketed in the Superior Court. Amended and supplemental answer was filed by Joseph and Frank Marshall, appellees, issues joined, evidence heard and decree entered by that court, finding Joseph Marshall was not indebted to the complainant, and that the defendant Frank Marshall was liable and should pay to the complainant the sum of \$65, dismissing the bill as to the defendant Joseph Marshall for want of equity. The decree further found that appellant, in open court, renounced all claims and demands against any of the defendants to the bill of complaint herein, other than Joseph Marshall and Frank Marshall.

Defendant Joseph Marshall testified that he assigned the lease in question to defendant Frank Marshall November 9, 1906, and that subsequently he had not been

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interested in or in occupation of such premises. A writing signed by Pony Moore was introduced discharging Joseph Marshall from all obligations under the lease. Defendant Frank Marshall testified that he had possession and paid rent for the premises from November 1, 1906, to March 1, 1908, and that he ceased to occupy such premises March 18, 1908. A transcript of a judgment of the Municipal Court of Chicago entered in an action brought to dispossess Pony Moore and Frank Marshall of the premises was admitted in evidence. Walter H. McDonald, agent for Mrs. Fowler, the owner of the premises, testified to taking steps to dispossess Moore and Marshall after default by them in payment of rent, and that after such dispossession the landlord rented the premises to one Leight. He also testified that Marshall paid \$150 a month to him as such agent, of which witness paid \$100 to Mrs. Fowler and the balance to Moore.

At the hearing complainant renounced all claims against all defendants except Frank and Joseph Marshall, and the court dismissed the bill for want of equity as to defendant Joseph Marshall.

A. D. GASH, for appellant.

E. H. MORRIS and SILBER, ISAACS, SILBER & WOLEY, for appellees Joseph and Frank Marshall.

MR. JUSTICE McGOORTY delivered the opinion of the court.

### Abstract of the Decision.

1. APPEAL AND ERROR, § 1831\*—*when additional evidence may be heard upon remanding cause.* In a bill by a trustee in bankruptcy to reach the interest of the bankrupt under a certain lease, where on review the Supreme Court without making a decision on the merits reversed the decree of the trial court and remanded the cause with direction to enter a decree requiring every person liable to the bankrupt for rent under such lease to pay to complainant as such

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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trustee the amounts for which such person was liable, but also holding that the record did not contain evidence sufficient to enable the reviewing court to determine who the persons so liable were, it was proper for the trial court to permit the action to be redocketed, to allow amendments and to hear further evidence.

2. APPEAL AND ERROR, § 1831\*—*when evidence not incompetent as relating to matters res adjudicata.* In a bill by a trustee in bankruptcy to reach the interest of the bankrupt under a certain lease, where the Supreme Court reversed the decree of the trial court and remanded the cause with a mandate which made it necessary that the trial court determine what persons were liable to the bankrupt under such lease, and the amounts for which such persons were liable, in a further hearing held to determine such questions, *held*, proper to admit evidence of persons holding such lease by assignment from the bankrupt and a transcript of a judgment entered by the Municipal Court of Chicago in action wherein the bankrupt and those claiming under him were dispossessed, such transcript being explained by the testimony of lessor's agent as to the manner in which such lease was terminated, all of such evidence being competent as tending to show that such lease had been terminated, and such evidence is not incompetent by reason of its having relation to matters *res adjudicata*, nor were defendants precluded from introducing such evidence by the fact that it was equally available to them at the time of the first hearing and not then introduced.

3. BANKRUPTCY, § 38\*—*when pleadings in another case admissible in action by trustee.* In a bill by a trustee in bankruptcy to reach the interest of a bankrupt under a certain lease, where on review the Supreme Court reversed the decree of the trial court with mandate requiring the trial court to ascertain what persons were liable to the bankrupt under such lease, and where one of the ultimate facts to be determined was the termination of the lease in question and the subletting thereafter by the owner to others, the pleadings in a cause involving the same leasehold *held* competent, although complainant was not a party to such action, as being one element in that chain of account tending to prove such ultimate fact.

4. BANKRUPTCY, § 38\*—*when evidence of tender of rent properly excluded in action by trustee.* In a bill by a trustee in bankruptcy to reach the interest of the bankrupt in a certain lease, where on remand after reversal by the Supreme Court one of the issues was whether the lease in question was terminated, evidence that after the termination of such lease a tender of rent was made to lessor by a person not a party to the action, *held* properly excluded as immaterial.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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5. **BANKRUPTCY, § 38\***—*when evidence sufficient to sustain decree in action by trustee.* In a bill by a trustee in bankruptcy to reach the rights of the bankrupt under a certain lease, where on review the Supreme Court reversed the decree of the trial court with mandate making it necessary for the trial court to ascertain what persons were liable to the bankrupt under such lease, and the amounts for which such persons were liable, a decree finding a particular defendant liable to the bankrupt under such lease *held* proper under the evidence, complainant having renounced all claims against all defendants except two, and the court having dismissed the bill for want of equity as to the other defendant, against whom complainant had not renounced his claims.

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**Doster & McKibben, Plaintiffs in Error, v. Michigan Central Railroad Company, Defendant in Error.**

**Gen. No. 20,275.**

1. **CARRIERS, § 30\***—*when duties and responsibilities of carriers governed by acts of Congress.* The duties and responsibilities of common carriers of interstate shipments are to be determined wholly by the acts of Congress and the interpretations thereof by the Federal Courts.

2. **CARRIERS, § 33a\***—*what is purpose of act as relating to rates.* Sections 2, 6, and 10 of the Interstate Commerce Act, as amended by Act of February 19, 1903, and Act of June 20, 1905, pertain only to the matter of *rates, fares and charges*, and prohibit any preference or discrimination *in that regard*, their broad purpose being to compel the establishment of reasonable rates and the uniform application thereof.

3. **CARRIERS, § 33a\***—*when carrier cannot waive provision in contract relating to rates.* Under the Interstate Commerce Act and its amendments a carrier cannot waive any provision in the contract under which the goods in question were transported which was determinative of the rate established for such transportation, for the reason that otherwise it would be within the power of the carrier to violate the law.

4. **CARRIERS, § 160\***—*when liability of carrier may be limited by special contract.* Under the Interstate Commerce Act and its amendments, the liability of the carrier may be limited by special contract without violation of the act, provided such limitation be just

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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and reasonable and does not exempt the carrier from liability due to negligence.

5. CARRIERS, § 177a\*—*when effect of waiver of provision requiring notice of damages of shipper cannot be evaded.* The Interstate Commerce Act, with its amendments, was not intended to apply to conditions in the contract between the carrier and the shipper which are not determinative of the rate established, or to enable the carrier to obtain advantages over the shipper in regard to such matters not possessed before the passage of the act, so that the mere fact that the contract in question was on a form filed with the Interstate Commerce Commission into which the carrier had incorporated provisions not determinative of the rate established would not enable the carrier to evade the effect of a waiver of a provision in the contract requiring the shipper to give notice to the carrier within a named time of any claim for damages under the contract, although the provisions incorporated into the form of contract so filed expressly state that a lower rate is given in consideration of the special provisions of the contract than would have been given without such provisions, especially where such incorporated provisions also expressly state the provisions of the contract which determined the lower rate, from which it may be reasonably presumed that all provisions in the contract other than those expressly stated would be contained in a contract based on the higher rate.

6. CARRIERS, § 218\*—*what does not constitute preference or discrimination within Interstate Commerce Act.* Under the Interstate Commerce Act and its amendments, the fact that the carrier might pay on its merits a claim for liability growing out of negligence in one instance, and might in another instance refuse to pay on its merits such a claim made by another shipper, would not constitute an act of preference or discrimination within the meaning of the act, where it appeared from the contract with the shipper whose claim was paid that the provision waived did not affect the rate established.

7. CARRIERS, § 185\*—*when provisions of interstate contract may be waived by carrier.* Under the Interstate Commerce Act and its amendments, provisions intended for the sole benefit of the carrier may be waived where such provisions are not determinative of the rate established.

8. CARRIERS, § 241\*—*when provision in contract limiting time within which claim for damages may be filed may be waived.* In an action to recover damages for the negligent transportation of stock in interstate commerce, under a contract providing that any claim for damages thereunder must be presented to the carrier within a

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stated time, the refusal of the trial court to hold as a proposition of law that under the Interstate Commerce Act and its amendments such provision might be waived, *held* erroneous.

Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed December 22, 1915.

E. L. GAREY, ARCHIE J. DEUTSCHMAN, FRANK D. FULTON and JOHN M. RANKIN, for plaintiffs in error.

WINSTON, PAYNE, STRAWN & SHAW, for defendant in error.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

The plaintiffs in error, hereinafter called the plaintiffs, brought an action of the fourth class in the Municipal Court of Chicago against the defendant in error, hereinafter called the defendant, to recover damages for alleged negligence.

A carload of sheep, the property of the plaintiffs, was delivered by them to the C., K. & S. Ry. Co., at Delton, Michigan, on February 9, 1911, to be transported to Union Stock Yards, Chicago, Illinois. The said railway company carried the car from Delton to Kalamazoo, Michigan, and there delivered it to the defendant, on February 9, 1911, and the latter transported the car to its destination. The negligence alleged in the plaintiffs' amended statement of claim was a failure to transport the sheep within a reasonable time, a failure to handle the same in a proper manner, and a failure to handle the same in a proper car, from Kalamazoo to its destination. The defendant, in its affidavit of merits, specifically denied the said acts of negligence and alleged that the shipment was handled under the provisions of a written contract between the plaintiffs and the said C., K. & S. Ry. Co., by the terms of which the defendant is released from liability for the alleged damages. The plaintiffs filed

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an amendment to their amended statement of claim in which they alleged that the said written contract contained a provision that, unless a claim for loss or damage be made in writing within five days from the time the stock is removed from the car, no claim should be allowed or paid by the carrier, or sued for in any court by the plaintiffs; that plaintiffs did not, within five days, present their claim, but that in February, 1911, the plaintiffs delivered a claim in writing to the defendant, and that "said defendant considered said claim without objection as to the matter of filing, and declined said claim on its merits, thereby waiving said provision."

The case was tried before the court and a jury and at the close of the plaintiff's case, the court, on motion of the defendant, instructed the jury to find the defendant not guilty. Judgment followed and the plaintiffs have sued out this writ of error to review the same.

On the trial it was stipulated that the defendant failed to transport the car of sheep within a reasonable time, and that the plaintiffs were damaged thereby; that the plaintiffs presented a claim in writing to the defendant on February 21, 1911, and that the latter duly acknowledged the receipt of the same and thereafter investigated the claim on its merits; that on April 17, 1911, the defendant wrote to the agent of the plaintiffs a letter, admitting a slight delay in the transportation of the stock and offering to pay the plaintiff "five dollars extra feeding charges which were incurred on account of the stock not arriving earlier, but this is positively the extent of our liability, and the feeding of the stock should make up any shrink which may have occurred. If you will kindly amend your claim to \$5, I will at once draw draft in your favor. J. M. Eedson, F. C. A."; that thereafter the defendant wrote to the plaintiff as follows:

"Replying to your favor of March 19th, our review of the claim file shows that there was no negligence

which would call for our assuming liability in this claim, hence my proposition of April 17th, requesting the claim amended to \$5.00 extra feeding charges is withdrawn, and the claim is declined outright''; and that the defendant did not make any point as to the five-day claim limitation clause in the contract during the negotiations for a settlement of the claim.

The said written contract, called a "Live Stock Contract," contained the following provisions:

*"That said shipper or the consignee is to pay freight thereon to the said carrier at the rate of 13 cts. per cwt., which is the lower published tariff rate based upon the express condition that the carrier assumes liability on the said Live Stock to the extent only of the following AGREED VALUATION, UPON WHICH VALUATION IS BASED THE RATE CHARGED FOR THE TRANSPORTATION OF THE SAID ANIMALS, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event, whether the loss or damage occur through the negligence of the said carrier or connecting carriers, or their employes or otherwise.*

*"If Horses or Mules—not exceeding One Hundred Dollars Each.*

*If Cattle or Cows—not exceeding Seventy-five Dollars each.*

*If Fat Hogs or Fat Calves—not exceeding Fifteen Dollars each.*

*If Sheep, Lambs, Stock Hogs, Stock Calves, or other small animals—not exceeding Five Dollars each.*

*And in no event shall the carrier's liability exceed \$1,200 upon any car load. (Italics ours; capitals not ours.)*

*"That said shipper is to pay all back charges and freight paid by said carrier or connecting carrier upon or for the transportation of said Live Stock.*

*"That the said shipper is at his own sole risk and expense, to load and take care of and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload same; and neither*

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said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same.

“That the said shipper is to inspect the body of the car or cars in which said stock is to be transported, and satisfy himself that they are sufficient and safe and in proper order and condition, and said carrier or any connecting carrier shall not be liable on account of any loss of or injury to said stock happening by reason of any alleged insufficiency in or defective condition of the body of said car or cars.

“That said shipper shall see that all doors and openings in said car are at all times so closed and fastened as to prevent the escape therefrom of any of the said stock, and said carrier or connecting carrier shall not be liable on account of the escape of any of said stock from said car or cars.

“The said carrier or any connecting carrier shall not be liable for or on account of any injury sustained by said Live Stock occasioned by any or either of the following causes, to-wit: Overloading, crowding one upon another, kicking or goring, suffocating, fright, burning of hay or straw or other material used for feeding or bedding, or by fire from any cause whatever, or by heat, cold, or by changes in weather, or for delay caused by stress of weather, by obstruction of track, by riots, strikes, or stoppage of labor or from causes beyond their control.

“That in the event of any unusual delay or detention of said Live Stock caused by the negligence of the said carrier, or its employes, or its connecting carriers, or their employes, or otherwise, the said shipper agrees to accept, as full compensation for all loss or damage sustained thereby, the amount actually expended by said shipper in the purchase of food and water for the said stock while so detained. That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent,

and delivered to the General Freight Agent of the said carrier at his office in the city of                      within five days from the time said stock is removed from said car or cars; and that, if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner and delivered in like time to some proper officer or agent of the carrier on whose line the loss or injury occurs.

“That whenever the person or persons accompanying said stock under this contract, to take care of the same, shall leave the caboose and pass over or along the cars or track of said carrier, or of connecting carriers, they shall do so at their own sole risk of personal injury from whatever cause, and neither the said carrier nor its connecting carriers shall be required to stop or start their trains or caboose cars at or from the depots or platforms, or to furnish lights for the accommodation or safety of the persons accompanying said stock, or to take care of the same under this contract.

“And it is further agreed by said shipper that, in consideration of the premises and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carriers without charge other than the sum paid or to be paid for the transportation of the Live Stock in charge of which he is, that the said shipper shall and will indemnify and save harmless said carrier and every connecting carrier from all claims, liabilities and demands of every kind, nature and description, by reason of personal injury sustained by said person or persons so in charge of said stock, whether the same be caused by the negligence of said carrier or any connecting carrier or of any of its employes or otherwise.

“And Doster & McKibbin do hereby acknowledge that they had the option of shipping the above described Live Stock at a higher rate of freight according to the official tariffs, classifications and rules of the said carrier and connecting carriers, and thereby receiving the security of the liability of the said carrier

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and connecting railroad and transportation companies as common carriers of the said Live Stock upon their respective roads and lines, but have voluntarily decided to ship same under this contract at the reduced rate of freight above first mentioned. (See back for Release of Man in Charge.)”

On the back of the contract appears the following:

**“RELEASE FOR MAN OR MEN IN CHARGE**

“In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract without charge, other than the sum paid or to be paid for the carriage upon said freight train of the Live Stock mentioned in said contract, of which Live Stock..... in charge,  
(I am or we are)

the undersigned do.....hereby voluntarily assume  
(Does or do)

all risk of accidents or damage to.....person  
(His or their)

or property, and do.....hereby release and dis-  
(Does or do)

charge the said carrier or carriers from every and all claims, liabilities and demands of every kind, nature and description for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of said carrier or carriers or any of its or their employes or otherwise.”

The defendant’s motion for a directed verdict in its favor was predicated solely on the ground that the plaintiffs had not filed a claim in writing verified by an affidavit within the five-day period designated in the contract. When the motion was made the plaintiffs submitted to the court (*inter alia*) the following propositions of law:

“1. The five-day claim limitation in defendants’ limited liability live stock contract is, as a matter of law, unreasonable and not a valid bar to plaintiffs’ right of action.



“2. That the question of whether or not the five-day limitation of claim provision was a reasonable clause was a question of fact for the jury.

“3. That such provision, if a reasonable provision, could be waived by the defendant.

“4. That such provision, if a reasonable provision, was waived by the defendant in this case, by negotiating with plaintiffs and considering plaintiffs' claim on its merits and constituted no valid bar to plaintiffs' action.

“5. That defendant having given a reason for its conduct and decision, in the letters written agents of plaintiffs, could not after this action was begun, change its ground, and put its conduct upon another and different consideration, to-wit: the failure on the part of the plaintiffs to file claim within five days, as provided in the limited liability live stock contract.

“6. That the five-day claim limitation clause in the live stock contract is a contract, rule, or regulation forbidden by the 20th Section of the Act to Regulate Commerce, as amended by the Act of June 29, 1906, known as the Carmack Amendment thereto. (34th Statutes at Large, page 593, Chapter 3591.)”

The trial court determined these propositions of law against the plaintiffs and held “that the five-day claim limitation in the defendant's limited liability live stock contract was, as a matter of law, reasonable, and a valid bar to the plaintiffs' right of action; \* \* \* that said provision could not be waived by the defendant; that the defendant could change its ground and put its conduct upon another and different consideration, to wit, the failure on the part of the plaintiffs to file their claim within five days as provided in the limited liability live stock contract, after having given as a reason for its conduct and decision in the letters written agents of the plaintiffs, before this action was begun; \* \* \* further that said plaintiffs were barred by such clause from any right of action.”

The plaintiffs first contend that the five-day claim limitation clause in the contract is void, for the reason



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that it "is a contract, rule, or regulation forbidden by the 20th section of the Act to Regulate Commerce, as amended by the Act of June 29, 1906, known as the Carmack Amendment thereto." On the oral argument of this case, the counsel for the plaintiffs conceded that the decision of the Supreme Court of the United States in the case of *Adams Exp. Co. v. Croninger*, 226 U. S. 491, is adverse to this contention.

Plaintiffs further contend that even if it be held that the time notice provision in the contract is not void, still it was one that "could be and was waived by the defendant in accepting the claim after the five-day expiration and negotiating within the plaintiffs and considering the plaintiffs' claim on its merits and constituted no valid bar to the plaintiffs' action." We have been referred to numerous authorities in support of this last contention. The defendant contends that "the cases which counsel for the plaintiffs cite in their brief as sustaining their contention that this provision was waived, are all cases from State courts or cases in the Federal Courts which arose prior to the amendments to the Interstate Commerce Act prohibiting discriminations and preferences between shippers. \* \* \* Whatever may have been the law prior to the passage of the Interstate Commerce Act as to the right of a common carrier to waive such provisions in its shipping contracts, since the new act has governed interstate transportation no such right exists"; that there was not and could not be any waiver of a compliance with the conditions of said clause by the defendant. A waiver would constitute a preference and a discrimination expressly forbidden by the Act to Regulate Commerce."

The duties and responsibilities of common carriers of interstate shipments are to be found wholly within the acts of Congress and the interpretations of the same by the Federal Courts. *Adams Exp. Co. v. Croninger, supra.*

In support of its position that a waiver of the provision in question would constitute a preference and a discrimination, expressly forbidden by the Act to Regulate Commerce, the defendant cites certain provisions of the act to which we will now refer.

Section 2 of the Act (3 Comp. Stat. U. S., p. 3155) prohibits and declares it to be unlawful for a carrier to charge a greater or less compensation for service rendered or to be rendered in the transportation of passengers or property, than it charges or receives from any person for a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions. Section 6 (*ibid.*, p. 3156) provides for the making and publication of schedules showing the rates, fares and charges for the transportation of passengers and property; and also (*ibid.*, p. 3157) for the establishing, where passengers and freight pass over continuous lines or routes operated by more than one carrier, of joint tariffs, showing rates, fares and charges for such continuous lines or routes, and also provides:

“And when any such common carrier shall have established and published its rates, fares and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares and charges as may at the time be in force.” (p. 3157.)

“It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare or charge is named thereon than is specified in the schedule filed with the commission in force at the time.” (p. 3158.)

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Section 10 (*ibid.*, pp. 3160, 3161) provides:

“Any person and any officer or agent of any corporation or company \* \* \* who shall knowingly and wilfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor,” etc.

The amendatory Act of February 19, 1903 (U. S. Comp. St. Supp. of 1903, p. 363), provides (page 364):

“It shall be unlawful for any person, persons or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to Regulate Commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to Regulate Commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced.”

The act of June 29, 1906 (Pub. Acts, No. 357; Supp. of 1909; U. S. Comp. Stat., p. 1155), provides:

“Nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.”

All of these provisions pertain only to the matter of *rates, fares and charges*, and they prohibit any preference or discrimination *in that regard*. In *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, it was said: “The act made it the duty of carriers subject

to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the act."

In *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, it was said that it was the purpose of Congress "to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published, and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published." The broad purpose of the commerce act was to compel the establishment of reasonable rates and their uniform application." To the same effect is *Armour Packing Co. v. United States*, 209 U. S. 57.

We think it can be said that whenever the Supreme Court of the United States has had occasion to pass upon the meaning and scope of the act in question, it has held that the purpose of the law was to prevent preference or discriminations in the matter of rates, fares and charges.

It is plain that the defendant could not waive any provision in the present contract that was determinative of the rate established. If it were otherwise, a carrier would have it in its power to nullify the law.

In our judgment, the vital question for us to determine in the present case is, was the notice clause in the contract determinative of the rate established?

The claim of the plaintiffs is for damages growing out of the negligence of the defendant in the transportation of the stock. There is no dispute between the

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parties as to rates, and there is no suggestion that they are attempting in any way to evade the law in question.

As we read the contract, the plaintiff received the benefit of the lower tariff rate established therein, solely because they agreed, that for any loss or damage to the stock, that they might suffer through the negligence of the defendant, or connecting carriers, the carrier assumed liability to the extent only of the agreed valuation of the stock. It has been held that the carrier's liability in that regard may be limited or qualified by special contract with the shipper, without violating the act in question, provided the limitation or qualification be just and reasonable and does not exempt the carrier from loss or liability due to negligence. *Adams Exp. Co. v. Croninger, supra; Missouri, K. & T. Ry. Co. v. Harriman Bros.*, 227 U. S. 657.

The defendant argues that the "Live Stock Contract" was incorporated and published as a part of its published tariffs and schedules in accordance with the provisions of the act; that thereby the lower rate mentioned in the contract was offered only to shippers who accepted the contract in its entirety; that the plaintiffs, by accepting the contract in its entirety, thereby received the benefit of the lower rate, and that the defendant is bound under the act to maintain and enforce all conditions and regulations contained in the contract; that as the plaintiffs failed to comply with the provision in reference to the notice of loss, the defendant cannot waive the said provision without violating the act.

We do not think that the act was intended to apply to conditions in a contract between a carrier and a shipper that are not determinative of the rate established. If the defendant is right in its present contention, it would follow that it could not waive any of the many provisions and regulations in the present contract. It is obvious that serious and injurious consequences to shippers would result, if the contention of

the defendant should prevail. The act was certainly not passed for the purpose of enabling carriers to obtain advantages over shippers in the matter of conditions or regulations in contracts that are not determinative of the rate established, that they did not have before the passage of the law. The mere fact that the defendant incorporated into the "Live Stock Contract" form, that was filed with the Interstate Commerce Commission, provisions that were not determinative of the rate established, would not, in our judgment, give to the defendant, in the matter of the said provisions, the new advantage over the shipper, of being able to evade the effect of a waiver by the carrier of the said provisions. The contract so filed expressly stated the provision that determined the lower rate, and it is reasonable to presume that all other provisions in the contract would be contained in a contract based upon the regular rate. Nor are we able to see how the fact that the carrier might accept and pay, on its merits, a claim of one shipper growing out of alleged negligence, and at the same time refuse to accept and pay, on its merits, a like claim of another shipper (neither having presented his claim within the time limited by his contract for transportation) would constitute an act of preference or discrimination within the meaning of the act, where it appeared from the contract of the party whose claim was accepted and paid, that the provision waived did not in any way affect the rate established.

In support of its contention that it would be a violation of the act in question for the railroad company to waive the five-day claim limitation clause, the defendant cites *Clegg v. St. Louis & S. F. R. Co.* (122 C. C. A. 273), 203 Fed. 971; *Kidwell v. Oregon Short Line R. Co.* (125 C. C. A. 313), 208 Fed. 1; *Davenport v. Chesapeake & O. Ry. Co.* (87 Misc. [N. Y.] 303), 149 N. Y. Supp. 865. We find nothing in the first two cases that supports the defendant's contention. In fact, we

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Doster et al. v. Mich. Cent. R. Co., 196 Ill. App. 49.

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think that these cases, by strong inference, at least, are adverse to defendant's contention. In the third case cited, practically no facts are stated in the opinion, and it is impossible to tell whether the time limit clause in the contract that was before the court was determinative of the rate established. If it were, an entirely different question from the one now before us was presented. The court in that case decided that the facts did not establish a waiver, and it expressed a doubt as to whether the carrier had the power to waive the time limit provision for the reason that the form of the bill of lading under which the shipment was made had been approved by the Interstate Commerce Commission.

The following cases hold that it would not be a violation of the act for a carrier to waive a provision like the one in question: *Donohoo Horse & Mule Co. v. Missouri, K. & T. Ry. Co.* (95 Kan. 681), 149 Pac. 436; *Crawford v. Southern Ry. Co.* (S. C.), 86 S. E. Rep. 19; *Clingan v. Cleveland, C., C. & St. L. Ry. Co.*, 184 Ill. App. 202.

The stipulation as to notice was for the sole benefit of the carrier, and before the passage of the act the courts repeatedly held that similar provisions could be waived, and as the present one was not determinative of the rate in the contract, we fail to see any good reason for holding that it would be a violation of the act for the defendant to waive the same. We think the conclusion we have reached is entirely in harmony with the reasoning of the court in *Boston & M. R. R. v. Hooker*, 233 U. S. 97.

There was evidence introduced tending to show a waiver of the five-day claim limitation clause by the defendant, and if we are correct in the conclusions that we have expressed as to the right of the defendant to waive the same, it follows that the trial court erred in refusing to hold the proposition of law submitted by the plaintiffs, to the effect that the said clause could be waived by the defendant, and in directing a verdict for



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the defendant. The judgment of the Municipal Court of Chicago must therefore be reversed and the cause remanded.

*Reversed and remanded.*

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**Thomas Claffy, Administrator, Defendant in Error,  
v. Mary Farrell, Plaintiff in Error.**

**Gen. No. 5,758.**

1. APPEAL AND ERROR, § 1036\*—*when assignment of errors constitutes declaration.* An assignment of errors stands as the declaration of the plaintiff in error.

2. APPEAL AND ERROR, § 361\*—*when plea to assignment of errors constitutes confession of error.* A plea to an assignment of errors, amounting to pleas of release of errors, constitutes a confession of error.

3. APPEAL AND ERROR, § 362\*—*when presumed errors well assigned.* In considering a demurrer to pleas of release of errors to an assignment of errors it will be assumed that the errors are well assigned.

4. APPEAL AND ERROR, § 362\*—*when judgment reversed on plea alleging release of errors.* Where pleas to an assignment of errors constitute a confession of error, the judgment should be reversed as to the parties pleading them unless the facts alleged in release of those errors are sufficient for that purpose.

5. APPEAL AND ERROR, § 263\*—*where existence of error not determined.* It is unnecessary to determine whether there was in fact error when there is a demurrer to a plea to an assignment of errors constituting a plea of release of errors.

6. APPEAL AND ERROR, § 361\*—*what constitutes plea of release of error.* On writ of error from a decree of a County Court approving an administrator's report, discharging the administrator and declaring the estate settled, pleas to the assignment of errors held to constitute pleas of release of errors,

7. APPEAL AND ERROR, § 360\*—*what does not constitute release of error.* The fact that the mother of an infant child and heir, after an alleged erroneous decree of sale of the land of the father, sold and conveyed her interest in the land including her homestead right, and abandoned and removed from the premises, does not operate as a release of error by the child who, as plaintiff in error, assigns as error that the sale was void as to the entire interest of the deceased, and consequently of his heir, plaintiff in error.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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8. APPEAL AND ERROR, § 260\*—*what does not constitute release of error.* The fact that third persons, in reliance upon an erroneous decree, purchased real estate does not operate as a release of error by a then infant, but now adult, child who sues out a writ of error, where plaintiff in error did nothing to mislead such purchasers or to induce them to acquire interests in the land.

9. APPEAL AND ERROR, § 1070\*—*when right to join in error not lost.* Under the Practice Act, sec. 109 (J. & A. ¶ 8646), defendants in error pleading a release of error to assignments are not deprived of the right to join in error.

10. HOMESTEAD, § 112\*—*when sale not valid.* There can be no valid sale of homestead property to pay debts subject to the right of homestead, unless the right therein is waived or assigned by law, where the homestead premises are worth less than \$1,000.

Error to the County Court of Lake county; the Hon. DEWITT L. JONES, Judge, presiding. Heard in this court at the October term, 1914. Demurrers to pleas sustained. Opinion filed January 6, 1915. *Certiorari* denied by Supreme Court (making opinion final).

EDWIN L. WAUGH and HAMLIN & TOPLIFF, for plaintiff in error.

COOKE, POPE & POPE, for defendant in error.

MR. PRESIDING JUSTICE CARNES delivered the opinion of the court.

William E. Farrell, a resident of Lake county, died intestate March 14, 1894, leaving Catherine Farrell, his widow, and Edward Farrell and Mary Farrell, his minor children and only heirs at law. He left household furniture valued at \$15 and other chattel property valued at \$75, and was at the time of his death the equitable owner of 143 acres of land in said county, the legal title to which was in Thomas Claffy as security for an indebtedness of \$2,000, subject to a prior mortgage incumbrance of \$4,000. Letters of administration were issued to Thomas Claffy March 6, 1895, and he qualified and proceeded to administer the estate in Lake county in the usual routine of such matters. An appraisement bill was filed and approved, fixing the widow's award at \$654. An inventory was filed

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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showing the interest of deceased in the above mentioned real estate. On July 5, 1895, claims were allowed aggregating \$138.86, and on that date the administrator proceeded under section 98 and following sections of our Administration Act (J. & A. ¶ 147 *et seq.*) in the County Court, to sell the interest of deceased in said real estate to pay debts. The just and true account required by the statute showed a deficiency of personal property for payment of claims allowed of about \$700 and just claims yet to be presented of more than \$500, making the total deficiency of personalty for payment of debts about \$1,200.

On August 9, 1895, the court entered an order directing the sale, and the administrator afterwards reported the interest of deceased in said real estate sold to J. M. Barron, the tenant in possession and a party to the action, for \$114. The sale was approved and conveyance ordered but the record shows no report of a conveyance made under the order. October 1, 1898, the administrator filed his final report and was discharged and the estate declared settled. The record brought here does not contain the final report but does contain the finding of the court that all costs of administration had been fully paid, that the widow had accepted \$300 in full payment of her award, which sum was partly contributed by the administrator, that all the assets of the estate were exhausted, leaving no funds with which to pay seventh-class claims and that the administrator had waived his claim for services; and the order approving the report, discharging the administrator and declaring the estate settled.

Mary Farrell, plaintiff in error, after arriving at the age of eighteen years, brings the record here for review on writ of error, and brings into court here, Thomas Claffy, the administrator, J. M. Barron, the purchaser at the sale, Catherine Farrell, the widow of deceased, Edward Farrell, the other heir of deceased, and various parties who have acquired interests in portions of

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the land by conveyances and mesne conveyances from J. M. Barron. And assigns errors as follows:

“First: The County Court of Lake county was without jurisdiction of the subject-matter to enter the said Decree of Sale.

“Second: The County Court of Lake county, Illinois, was without jurisdiction of all the necessary and proper parties defendant or respondent to enter said Decree of Sale.

Third: The County Court of Lake county, Illinois, erred in entering the said Decree of Sale.

“Fourth: The said attempted sale of real estate by the Administrator of the Estate of William E. Farrell, deceased, had under the authority of said alleged Decree of Sale, was illegal and absolutely null and void for want of the proper legal authority to make said sale, which said pretended sale, involving the sale of a homestead was made contrary to the provisions of the law of the State of Illinois.

“Fifth: The County Court of Lake county, Illinois, erred in entering the order approving said alleged sale of real estate.

“Sixth: The County Court of Lake county, Illinois, erred in entering the order of October 1, 1898, allowing certain claims aggregating \$999.87.

“Seventh: The County Court of Lake county, Illinois, erred in entering the order approving the Final Report and Account of the Administrator of the Estate of William E. Farrell, deceased.”

Defendants in error William Ryan, Tobias Jensen, William C. Upton and E. M. Hauser, terre tenants, file here a plea to “the Third Assignment of Error, the sale of the real estate referred to in the Fourth Assignment of Error, and the order of court approving the sale of the real estate.” Defendant in error Joseph M. Barron filed a plea to the whole assignment of error and defendant in error Harry H. Beach, one of the terre tenants, filed a plea to the first, second, third,

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fourth and fifth assignments of error. Defendants in error who have not pleaded are Catherine Farrell, Edward Farrell, Jane Shaw, J. A. Moulton, Mary J. Fitch, Chicago and Northwestern Railway Company and Thomas Claffy; the latter, Thomas Claffy, has filed a brief seeking to sustain the validity of the pleas, the other defendants in error last named have not filed an appearance.

Plaintiff in error has filed demurrers to the pleas which we took with the case.

The facts pleaded as summarized in defendants' in error's brief are as follows:

"1. That the administrator in pursuance of the decree sought to be set aside, sold the real estate in question to the defendant in error, J. M. Barron, by the name, style and description of Joseph M. Barron.

"2. That in pursuance of said sale and after it had been reported and approved by the court, said administrator executed and delivered to said J. M. Barron, defendant in error, an administrator's deed dated October 12, 1895.

"3. That Catherine Farrell, the widow of the deceased, in consideration of three hundred dollars (\$300), sold and conveyed all her right, title and interest in said real estate, including her homestead rights to the defendant, J. M. Barron, and executed and delivered a deed to him dated the 14th day of October, 1895, releasing all rights of homestead exemption, in the body of the deed and in the certificate of acknowledgment.

"4. That prior to or about the time of the execution of said deed, said Catherine Farrell abandoned her homestead in said real estate taking said two minor children with her, and has never since occupied the same as a homestead or otherwise, but has lived in the County of Cook for over twelve years last past and said children have lived with her.

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“5. That in March, 1902, said defendant in error, J. M. Barron, sold said real estate to the defendant in error, Harry H. Beach, and by deed dated March 7, 1902, he conveyed the same to Mary J. Fitch in pursuance of said sale to said Harry H. Beach.

“6. That on the 23d day of June, 1905, said Mary J. Fitch sold five and one-half acres of said estate to a railroad company.

“7. That on the 8th day of March, 1907, said Mary J. Fitch gave a trust deed upon said estate to William C. Upton, trustee, a defendant in error, to secure the payment of a promissory note for five thousand dollars, held by the defendant in error, E. M. Hauser.

“8. That said Mary J. Fitch and the defendant in error, Harry H. Beach, sold and conveyed the balance of said real estate to the defendant in error, Tobias Jensen for the sum of eleven thousand dollars and by their warranty deed dated October 13, 1908, conveyed the same to him, the said Tobias Jensen.

“9. That said Tobias Jensen became and now is the bona fide owner of said real estate except that part conveyed to the railroad company.

“10. That the defendant in error, William Ryan, is in possession of said real estate as a tenant of said Tobias Jensen, except said five and one-half acres sold to the railroad company.

“11. That said Catherine Farrell was of lawful age at the time of the entering of said decree authorizing said administrator to sell said real estate, and was not under duress or non compos mentis.

“12. That said plaintiff in error, Mary Farrell, arrived at the age of eighteen years in July, 1911; and the said Edward Farrell arrived at the age of twenty-one years in April, 1913.”

The assignment of errors stands as the declaration of the plaintiff in error. *Schaeffer v. Ardery*, 238 Ill. 557; *Austin v. Bainter*, 40 Ill. 82. The pleas amount to a confession of error, for which, as to the parties plead-

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ing them, the judgment should be reversed, unless the facts alleged in release of those errors are sufficient for that purpose. *Thornton v. Houtze*, 91 Ill. 199; 2 Cyc. 1008. In considering this demurrer it must be assumed the errors are well assigned. *Martin v. Com'rs of Highways*, 150 Ill. 158. It is unnecessary to inquire whether there was in fact error. *Page v. People*, 99 Ill. 418; *Beardsley v. Smith*, 139 Ill. 290.

Assuming then that the decree is bad as charged in the assignment of errors, and it was in fact bad if the property sold was the homestead estate of deceased, because there can be no sale of property to pay debts subject to the right of homestead, unless the latter is waived or assigned in the manner provided by law, where the homestead premises (the estate of the householder in the land) are worth less than \$1,000. *Hartman v. Schultz*, 101 Ill. 437; *Mueller v. Conrad*, 178 Ill. 276. Then the inquiry is whether any fact or facts pleaded are sufficient to work a release of such error by the plaintiff in error who was a party to the suit in which the error was committed.

The fact pleaded that the mother of plaintiff in error, after the decree of sale, sold and conveyed her interest in the land, including her homestead right, and abandoned and removed from the premises, does not operate as a release of error by the child; because while it is true as argued by counsel that the homestead right of the widow and her minor children is during the minority of the children under the control of the mother and she may defeat their right by abandoning the homestead, still the errors assigned are not that the sale failed to result in a conveyance of the homestead estate, but that it was void as to the whole interest of the deceased and consequently of his heir, the plaintiff in error, in the land in question. The substance of the other facts relied upon to work a release of error is that conveyances were made under the decree sought to be reversed and that innocent

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purchasers have acquired interests in the real estate in question on the faith of the judicial proceedings. It is not pleaded that plaintiff in error has done anything to mislead such purchasers or to induce them to acquire interests in the land. It is difficult to see how the acts of other parties entirely unconnected with plaintiff in error could operate as a release of error by her. *Martin v. Com'rs of Highways, supra*. Counsel in support of their pleas call our attention to *Denk v. Fiel*, 249 Ill. 424; and *Ure v. Ure*, 223 Ill. 454; holding that innocent third parties may rely upon decree of court. Neither of these cases is authority for the position that third persons, purchasing pending the suing out of a writ of error, may prevent the reversal of an erroneous decree, and we know of no such authority. What rights, if any, innocent purchasers of the land in question may have, as among themselves or against plaintiff in error, in some appropriate proceeding if the decree is reversed is not a question now before us.

If the errors are well assigned (and the pleas admit they are), we are of the opinion that there is nothing in the facts pleaded that operate as a release of those errors by Mary Farrell, therefore the demurrer to the pleas must be sustained and the pleas adjudged bad. We are of the opinion that the pleas should each be treated as a plea of release of errors, and under section 109 of our Practice Act (Jones & Addington Stats. ¶8646), defendants in error so pleading are not deprived of the right to join in error. *Schaeffer v. Ardery, supra*; therefore leave is given to such defendants in error and each of them to join in error if they or he shall be so advised, and in that event to file brief and argument by the first day of the next term.

*Demurrers to pleas sustained.*



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Lyons v. Lyons, 196 Ill. App. 73.

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**Mary Frances Lyons, Plaintiff in Error, v. Joseph P. Lyons, Defendant in Error.**

**Gen. No. 5,991. (Not to be reported in full.)**

Error to the Circuit Court of Livingston county; the Hon. THOMAS M. HARRIS, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed June 22, 1915.

**Statement of the Case.**

Bill for divorce by Mary Frances Lyons, complainant, against Joseph P. Lyons, defendant, in the Circuit Court of Livingston county. To reverse a decree dismissing the bill and ordering costs to be paid by both parties, defendant prosecutes this writ of error.

It appears that the plaintiff in error filed a bill for separate maintenance November 19, 1912, in which she alleged among other things:

That she is and has been for many years last past been a resident of the said County of Livingston, State of Illinois; and charged as grounds for relief extreme and repeated cruelty, setting out in detail in support of the charge acts of the husband which if proven would entitle her to a decree of divorce if the prayer of the bill asked that relief. Defendant in error filed an answer January 16, 1913, in which he "admits that the said complainant, Mary Frances Lyons, has been a resident of the said County of Livingston, in the State of Illinois for many years last past," and denies all charges of cruelty.

Afterwards, January 21, 1914, plaintiff in error filed an amended bill praying for a divorce instead of separate maintenance, otherwise not differing materially from her former bill. Defendant in error answered, February 29, 1914, with the same admissions and denials as in his former answer.

The record showed no trial except as contained in the decree, which, after reciting the appearance of parties



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and a hearing on the pleadings and evidence, finds that the court had jurisdiction, that the equities are with defendant, and further finds affirmatively that defendant was not guilty of cruelty as alleged.

MICHAEL F. RYAN and W. J. LEWIS, for plaintiff in error.

E. A. SIMMONS, for defendant in error.

MR. PRESIDING JUSTICE CARNES delivered the opinion of the court.

### Abstract of the Decision.

1. **DIVORCE, § 33\***—*when answer construed as admitting residence of complainant in county for statutory period.* In a bill for divorce an answer which admits that complainant "has been a resident" of the county wherein the bill was filed "for many years last past" is not open to the objection that it does not exclude the possibility that complainant might not have been a resident of this State for more than one year prior to the filing of the bill as required by the statute in order to give jurisdiction of the action.

2. **DIVORCE, § 77\***—*when general finding of trial court as to jurisdiction not conclusive on appeal.* In a bill for divorce, where the objection of want of jurisdiction is made on the ground of want of residence as required by the statute, it is not a sufficient answer to the objection that the trial court made a general finding that it had jurisdiction of the parties and subject-matter of the action.

3. **DIVORCE, § 70\***—*when defendant estopped to object to want of jurisdiction on appeal.* In a bill for divorce, a proper allegation of residence in the bill, if admitted by the answer, will be sufficient on review to estop either party from making the objection of want of jurisdiction.

4. **DIVORCE, § 77\***—*when decree reversed on appeal for lack of jurisdiction.* A decree in a bill for divorce, which on review is not supported by a certificate of evidence or finding of facts showing the residence of complainant to have been as required by the statute in order to give jurisdiction of the action, will be reversed on writ of error or appeal, although such a decree would be good as against a collateral attack, for the reason that in such case the question of residence goes to the jurisdiction and may be raised for the first time on review.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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5. APPEAL AND ERROR, § 725\*—*when not necessary on review that decree be supported by findings of fact or certificate of evidence.* The rule that a decree granting relief must be supported on review by findings of fact or a certificate of the evidence in so far as the allegations of the bill are not admitted by the answer, applies only to decrees granting affirmative relief which is sought in the bill.

6. APPEAL AND ERROR, § 725\*—*when evidence not necessary to support decree.* A decree dismissing a bill needs no supporting evidence, since such a decree may be rendered for want of evidence.

7. DIVORCE, § 53\*—*what constitutes dismissal of bill for want of equity.* A decree in a bill for divorce which denies complainant's prayer is equivalent to a decree dismissing a bill for want of equity.

8. EQUITY, § 345\*—*when decree not initiated by mere informality.* A decree dismissing a bill for want of equity is not vitiated by mere informality.

9. DIVORCE, § 58\*—*when decree dismissing bill not rendered insufficient by incorporation of unnecessary finding of facts.* Where a decree dismisses a bill for divorce, the fact that an unnecessary finding of facts is incorporated in the decree as a reason therefor does not make it necessary that the decree should find other facts or give other reasons.

10. DIVORCE, § 53\*—*when duty of court to dismiss bill for lack of jurisdiction.* In a bill for divorce, where the court finds that it has not jurisdiction owing to want of residence as required by the statute, it is the duty of the court to dismiss the bill and to provide in some way for payment of costs to be charged against the parties in the proceeding.

11. DIVORCE, § 80\*—*when court has discretion to apportion costs between parties.* In chancery, and especially in divorce cases, the court has a large discretion in apportioning costs between the parties.

12. DIVORCE, § 77\*—*when finding as to residence of complainant not necessary to enable court to enter decree.* In a bill for divorce, a finding of the residence of complainant for such time as required by the statute to give jurisdiction, held not necessary in order to enable the court to enter a decree, where the record showed a sufficient averment of such residence in the bill, complainant being estopped by such averment from assigning as prejudicial error the failure of the trial court to include such a finding in its decree.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Sulski v. Metropolitan Life Ins. Co., 196 Ill. App. 76.

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**Charles Sulski, Administrator of the Estate of Minnie Seabach, Appellee, v. Metropolitan Life Insurance Company, Appellant.**

**Gen. No. 5,944.**

1. **INSURANCE, § 753\***—*when insurer not liable because of misrepresentations as to health.* An insurance company cannot be held liable on a policy of life insurance providing that it shall be void if before its date insured "has been \* \* \* attended by a physician for any serious disease or complaint or has had before its date any pulmonary disease," where it appears that before the date of the policy insured had been treated by a physician for tuberculosis, unless there is evidence of a waiver of the condition made after insured had knowledge or notice of the facts relied on in defense, for the reason that to allow a recovery in such a case would be to violate the terms and conditions of the policy.

2. **INSURANCE, § 855\***—*when return of premiums not condition precedent to making defense.* In an action to recover on a policy of life insurance, wherein plaintiff was named as beneficiary, a return of the premiums paid on the policy is not a prerequisite to a defense to such action where the defense is grounded on a violation of the conditions of a policy or the terms of the contract, for the reason that such conditions were accepted by insured and are therefore binding on the beneficiary.

3. **INSURANCE, § 855\***—*when return of premiums is prerequisite to defense to life insurance policy.* The return of premiums paid under a life insurance policy is a necessary prerequisite to a defense to such policy only where it is sought thereby to avoid the policy *ab initio* or to rescind or set it aside on the ground of fraud in its procurement, for the reason that in such case, as in all cases of rescission, it is necessary to place the parties in *statu quo*, it being inconsistent in such case to claim that the policy was never in force and at the same time to retain the premiums paid as consideration for a risk never assumed.

4. **INSURANCE, § 753\***—*when liability of insurer determined only by insured being in good health.* In a policy of life insurance providing that no obligation is assumed by the insurer unless at the date of the policy the insured is alive and in sound health, the fact of the sound health of insured at such time is what determines the liability of insurer, and not the apparent health of insured, nor any one's belief that insured was in sound health at such time.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Sulski v. Metropolitan Life Ins. Co., 196 Ill. App. 76.

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Appeal from the Circuit Court of Bureau county; the Hon. JOE A. DAVIS, Judge, presiding. Heard in this court at the October term, 1914. Reversed with finding of facts. Opinion filed July 15, 1915.

DUNCAN, DOYLE & O'CONOR, for appellant.

BUTTERS & CLARK, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

This is an action brought against the Metropolitan Life Insurance Company, appellant, in the Circuit Court of Bureau county, to recover the amount claimed by the appellee to be due and payable under the terms of a life insurance policy issued by the appellant on the life of Lulu Seabach, for the benefit of her mother, Minnie Seabach. The policy was dated September 12, 1910, and the insured died March 23, 1911. The required proofs of death were furnished to the appellant by the beneficiary. The trial by jury was waived, and the case heard by the court. The court found the issues for the appellee and rendered a judgment against the appellant for the sum of \$251.87, and costs of suit, from which judgment and appeal was prosecuted to this court.

The policy of insurance contained the provision concerning the liability of the appellant, namely, that "no obligation is assumed by the company prior to the date hereof, nor unless on said date the insured is alive and in sound health." Also the following provision: "This policy is void if the insured before its date has been rejected for insurance by this or any other company, or has been attended by a physician for any serious disease or complaint; or has had before said date any pulmonary disease," etc.

The evidence conclusively shows that the insured had been attended professionally by a physician prior to the date of the policy, that is to say from March, 1910 to January, 1911, and that she had been treated for

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tuberculosis during that time. It also shows that upon the date when the policy was issued, the insured had pulmonary tuberculosis, and that this disease was the cause of her death. A recovery on this policy would therefore be in plain violation of the terms and conditions of the contract of insurance embraced in the policy, and it is clear that the appellant cannot be held liable, unless it has waived its right to make its defense for a violation of the terms and conditions mentioned, by accepting the premiums paid, after it had notice or knowledge of the matters of defense stated, and this does not appear to be the case. The knowledge of the matters upon which the appellant bases its defense did not come to the appellant until after the death of the insured.

But it is strongly insisted by the appellee that in cases of this kind an insurance company cannot defend against liability under a policy of insurance, if it has retained the premiums received or has failed to tender them back, and this seems to have been the view taken by the trial court. The contention has apparent support in the decision of the case of *McCurrey v. Metropolitan Life Ins. Co.*, 168 Ill. App. 625. A return of the premiums however is not a necessary legal prerequisite where the defense against liability is sought to be avoided upon the basis of a violation of the conditions of the policy, or the terms of the contract of insurance. It is necessary, only, where it is sought to rescind or set aside the policy or contract of insurance, as, for instance, for fraud or fraudulent representations on the part of the insured in procuring such contract. The correct rule governing this class of cases is clearly stated by our Supreme Court in the case of *Dickerson v. Northwestern Mut. Life Ins. Co.*, 200 Ill. 270, in these words: "Where the insurance company seeks to rescind and declare the contract void *ab initio*, it must, as in all cases of rescission, place the parties in *statu quo*, because in such cases it would be inconsistent to

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claim that the policy was never in force, and at the same time retain the premiums paid as the consideration for a risk, which had never been assumed.”

In this case it is not attempted to rescind or set aside the contract or have it declared void *ab initio*, but the defense is based upon a violation of the terms and conditions of the policy itself, which the insured accepted, and which are therefore binding upon the beneficiary. For such a defense a return of the premiums collected is not legally a prerequisite. *In re Millers' & Manufacturers' Ins. Co.* (97 Minn. 98), 4 L. R. A. (N. S.) 231; *Goorberg v. Western Assurance Co.*, 150 Cal. 510.

It is well-settled law that the liability of an insurance company may be legally avoided by a violation on the part of the insured of clauses in an insurance policy like those now under consideration, and many authorities might be cited to sustain this view, but we desire to refer to one which appears peculiarly pertinent to this controversy, namely, the case of *Murphy v. Metropolitan Life Ins. Co.*, 106 Minn. 112, in which the court makes the following expressive statement of the law: “The defense is based upon the express provision of the policy, that no obligation is assumed by the defendant company, unless on the date of the policy the assured is alive and in sound health. It is clear from the language of the policy, that the defendant’s promise of insurance was not absolute but conditional, and that the existence of life and sound health in the insured on the date of the policy is the condition upon which the promise is made. It is the fact of the sound health of the insured which determines the liability of the defendant, not his apparent health, or his or any one’s opinion or belief that he was in sound health. Therefore, if the insured was not in fact in sound health on the date of the policy, the defendant is not liable, unless it has waived the defense.”

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Sulski v. Metropolitan Life Ins. Co., 196 Ill. App. 76.

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So also, in the case of *Gallant v. Metropolitan Life Ins. Co.*, 167 Mass. 79, the court sums up the discussion of this question by saying: "The company made its own contract, a part of which was that no obligation was assumed by the company unless at the time when the policy was issued the insured was 'alive and in sound health.' If in fact the insured at that time was not in sound health, the defendant is not liable on the policy." And the case of *Barker v. Metropolitan Life Ins. Co.*, 188 Mass. 542, is to the same effect. In the case of *Hermann v. Court of Honor*, 193 Ill. App. 366, at the present term of this court, the matter of the necessity of a return of the premiums received, as a legal prerequisite to making a defense, under circumstances and conditions similar to those involved in this case, was discussed at some length and decided by the court, and the same conclusion was reached as in the present case.

For the reasons stated we are of opinion, therefore, that the trial court erred in refusing to hold the propositions of law submitted by the appellant, which were to the effect that if the insured before the date of the issuance of the policy in question had been attended by a physician for a serious disease or complaint, or had had before said date any pulmonary disease, or if at the date of the issuance of the policy of insurance the insured was suffering from pulmonary tuberculosis and was not in sound health, then that the beneficiary of the policy was not entitled to recover. These propositions should have been held to be the law, and upon the facts and the law the finding and judgment of the court below should have been for the appellant. The judgment is therefore reversed.

*Reversed with finding of facts.*

Finding of facts to be incorporated in the judgment.

We find that the insured in this case, prior to the date of the insurance policy in question, had been attended by a physician for a serious disease, and had



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pulmonary tuberculosis, and was not in sound health at the date of the issuance of this policy; and that appellant had no notice or knowledge of the matters of defense above stated until after the death of the insured.

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**Grace L. Ferry, Administratrix, Appellant, v. City of Waukegan, Appellee.**

**Gen. No. 6,054. (Not to be reported in full.)**

Appeal from the Circuit Court of Lake county; the Hon. CHARLES WHITNEY, Judge, presiding.. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed July 15, 1915. Rehearing denied October 21, 1915.

**Statement of the Case.**

Action on the case by Grace L. Ferry, administratrix of the estate of Edward L. Ferry, deceased, plaintiff, against the City of Waukegan, defendant, in the Circuit Court of Lake county, to recover for the death of plaintiff's intestate, as a result of an automobile accident alleged to be due to defendant's negligence.

Defendant pleaded the general issue, and at the close of the evidence, the court on motion of defendant excluded all the evidence and instructed the jury to find defendant not guilty, and a verdict was returned in accordance with the instruction. A motion for a new trial was denied. From a judgment for defendant, plaintiff appeals.

The testimony given by a number of witnesses for the plaintiff reasonably and fairly tends to prove that the pile of cement, hardened sand or debris had remained in the street, in the usual line of travel, about six weeks, and that no effort had been made by the city authorities to remove it, nor to provide a warning by which to direct the attention of travelers passing



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Ferry v. City of Waukegan, 196 Ill. App. 81.

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in vehicles along the street, in the dusk or darkness of the evening, of its presence there; that on the afternoon of the day upon which this accident occurred, the appellant's intestate was riding as a guest in the automobile of his brother who managed and drove it; that the accident occurred in the early dusk of the evening; that the driver of the automobile ran in the usual course of travel on the street, and was in the act of passing around a wagon, which had a hay rack on it, when the automobile collided with the pile mentioned, the presence of which was unknown to the driver. The concussion caused by the collision threw the occupants out of the automobile and onto the pavement, injuring the appellant's intestate so severely that he died in consequence of his injuries within a few hours.

COOKE, POPE & POPE, for appellant.

ARTHUR BULKLEY, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

### Abstract of the Decision.

1. TRIAL, § 153\*—*when evidence raises question for jury.* Where there is evidence on which the jury could, "in the eye of the law," reasonably find for plaintiff, the issue must be determined by the jury.

2. MUNICIPAL CORPORATIONS, § 1107\*—*when question whether decedent exercised due care in operation of automobile question for jury.* In an action to recover for the death of plaintiff's intestate by reason of being thrown from an automobile in which he was riding, but which was driven by another, as a result of such automobile's striking a pile of cement and other materials which defendant was alleged negligently to have permitted to remain in the street, where it appeared that the accident occurred in the nighttime, and it was relied on in defense that such driver failed to turn on his lights and that at the time of the accident was driving such automobile at an

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Swenson v. City of Aurora, 196 Ill. App. 83.

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excessive rate of speed, the question whether decedent used due care under the circumstances was for the jury.

3. MUNICIPAL CORPORATIONS, § 1107\*—*when speed of automobile question for jury.* In an action to recover for the death of plaintiff's intestate as the result of an automobile accident, where the defense relies on the contributory negligence of the driver of the automobile in that at the time of the accident such automobile was being driven at an excessive rate of speed, the question of excessive speed is one of fact for the jury.

4. MUNICIPAL CORPORATIONS, § 1107\*—*when question for jury whether absence of lights on or excessive speed of automobile were separately or together contributory and concurrent causes of accident.* In an action to recover for the death of plaintiff's intestate as the result of an automobile accident occurring at night, where it is relied on in defense that the accident was caused by the failure of the driver of the automobile to turn on his lights, and by the excessive speed at which the automobile was running at the time of the accident, it is a question of fact for the jury whether the alleged absence of lights or excessive speed were, together or separately, contributory and concurrent causes of the accident.

5. NEGLIGENCE, § 198\*—*when contributory negligence question for jury.* Where contributory negligence is relied on as a defense, the question is usually for the jury.

6. TRIAL, § 199\*—*when error to direct verdict.* In an action where the evidence on controverted questions of fact is conflicting, it is error to direct a verdict.

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## Jacob Swenson, Appellee, v. City of Aurora, Appellant.

### Gen. No. 6,015.

1. MUNICIPAL CORPORATIONS, § 1107\*—*when questions of size and depth of hole in sidewalk and danger therefrom for the jury.* In an action to recover for personal injuries alleged to have been sustained as a result of stepping into a hole in a sidewalk, the question of the size and depth of such hole and whether it was of a character to render it dangerous to pedestrians exercising due care is for the jury.

2. MUNICIPAL CORPORATIONS, § 1107\*—*when question whether fall on sidewalk proximate cause of injuries for jury.* In an action to recover for personal injuries alleged to have been sustained as a

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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result of stepping through a hole in a sidewalk, the question whether plaintiff's alleged fall on the sidewalk was the proximate cause of the injuries sought to be recovered for is for the jury.

3. MUNICIPAL CORPORATIONS, § 1107\*—*when nature, extent and cause of injuries, to one stepping in hole in sidewalk for jury.* In an action to recover for personal injuries alleged to have been sustained as a result of stepping through a hole in a sidewalk, where plaintiff claims such injuries resulted in a permanent stiffening of the joints of his knee and ankle, the question of the nature and extent of the injuries sustained by plaintiff by reason of the fall, and whether the stiffening of the joints was due to that accident or to a fracture of the thigh which plaintiff was shown to have suffered six months later, are questions for the jury.

4. APPEAL AND ERROR, § 1404\*—*when verdict of jury will not be disturbed on appeal.* The verdict of a jury on controverted questions of fact will rarely be disturbed by a court of review unless unreasonable, or it is apparent that such verdict is the result of the passion and prejudice of the jury.

5. MUNICIPAL CORPORATIONS, § 1079\*—*when declaration describing place of accident sufficient.* In an action to recover for personal injuries alleged to have been sustained as a result of stepping through a hole in a sidewalk, a declaration alleging that the accident took place "on LaSalle street" in the City of Aurora, held not insufficient in not alleging that such street was a public street, as the word "street" is a generic term, including within its meaning all public roads of ways within a municipality over which such municipality has jurisdiction and as to which such municipality owes a public duty to keep and maintain it in a reasonably safe condition for public use.

6. EVIDENCE, § 148\*—*when proper to permit exhibition of injured leg to jury.* In an action to recover for injuries to plaintiff's leg alleged to have been sustained as a result of stepping into a hole in a sidewalk, it is proper to permit plaintiff to exhibit his injured leg to the jury.

7. DAMAGES, § 168\*—*when error to refuse physical examination of plaintiff.* In an action to recover for injuries to plaintiff's leg, alleged to have been sustained as a result of stepping into a hole in a sidewalk, where plaintiff was permitted to exhibit the injured leg to the jury, the refusal of the trial court to permit a physical examination of the leg by defendant's physician held error, defendant having the right in such case not only to inspect the leg by sight but also to make a physical examination thereof, under such reasonable restrictions as the court might require.

8. MUNICIPAL CORPORATIONS, § 1225\*—*what are elements essential to validity of notice to city of injuries.* In Hurd's Rev. St., ch. 70,

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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sec. 7 (J. & A. ¶ 6190), requiring persons intending to commence an action against a municipal corporation for personal injuries to give certain notice to such corporation before bringing an action, five elements are emphasized as being essential to the validity of a notice given under the statute: (1) The name of the person to whom such cause of action has accrued; (2) the name and residence of the person injured; (3) the date and about the hour of the accident; (4) the place or location where the accident occurred; (5) the name and address of the attending physician, if any.

9. MUNICIPAL CORPORATIONS, § 1225\*—*when notice to city as to place where accident occurred sufficient.* In an action to recover for personal injuries alleged to have been sustained as a result of stepping into a hole in a sidewalk in defendant city, a notice to defendant wherein the hole in question was alleged to be "located upon the west side of said LaSalle street between North avenue and Washington street and opposite Jennings Seminary," held insufficient under Hurd's Rev. St., ch. 70, sec. 7 (J. & A. ¶ 6190), requiring such notice to be given before bringing an action for damages against a municipal corporation to recover for personal injuries, where plaintiff's testimony fixes the location with sufficient definiteness as being located "in the sidewalk about fifty-five feet north of the corner of North avenue," and where no reason appears why plaintiff could not in such notice have fixed the location of such hole with equal definiteness.

10. MUNICIPAL CORPORATIONS, § 1225\*—*what notice to city describing place of accident must contain.* A notice to a municipal corporation of intention to commence an action to recover for personal injuries, given in pursuance of Hurd's Rev. St., ch. 70, sec. 7 (J. & A. ¶ 6190), must, in order to be legally sufficient, contain a sufficiently definite description of the place of the accident as to enable the party interested to identify it from the notice itself.

11. MUNICIPAL CORPORATIONS, § 1225\*—*when notice to city inaccurately describing place of accident sufficient.* A notice to a municipal corporation of intention to commence an action to recover for personal injuries, given in pursuance of Hurd's Rev. St., ch. 70, sec. 7 (J. & A. ¶ 6190), is sufficient, although the description of the location of the accident be insufficient, provided that in the remainder of the notice the place where the accident occurred describes such place with sufficient definiteness to enable the authorities of such municipal corporation to determine such location.

12. MUNICIPAL CORPORATIONS, § 1225\*—*what are requisites of notice to city of personal injuries.* The notice required by Hurd's Rev. St., ch. 70, sec. 7 (J. & A. ¶ 6190), to be given to a municipal corporation before bringing an action for damages for personal in-

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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juries must be specific and not general as to both time and place, and as definite and exact as it can be reasonably made.

13. MUNICIPAL CORPORATIONS, § 1225\*—*when notice to city of injuries wrongly stating time of accident defective.* Although the notice required by Hurd's Rev. St., ch. 70, sec. 7 (J. & A. ¶ 6190), to be given to a municipal corporation by one intending to commence an action against such municipal corporation for personal injuries need only set forth "about the hour" when the accident occurred, and therefore does not require an exact statement thereof, yet where claimant in such notice undertakes to state such time exactly and states it wrongly, the notice is insufficient under the statute for the reason that in such case the notice is misleading and detrimental in that it gives the municipal corporation no aid in determining the facts, being in practical effect no better than if the notice had not stated "about the hour" when the accident occurred.

14. MUNICIPAL CORPORATIONS, § 1225\*—*when notice to city not giving hour of accident, fatally defective.* Under Hurd's Rev. St., ch. 70, sec. 7 (J. & A. ¶ 6190), requiring persons intending to commence an action against a municipal corporation for damages for personal injuries to give certain notice to such municipal corporation, a notice which does not state the hour when such accident occurred is fatally defective.

15. MUNICIPAL CORPORATIONS, § 1225\*—*when notice to city of injuries incorrectly stating residence of claimant fatally defective.* Under Hurd's Rev. St., ch. 70, sec. 7 (J. & A. ¶ 6190), requiring persons intending to bring an action against a municipal corporation for damages for personal injuries to give certain notice to such municipal corporation before bringing an action, a notice which incorrectly states the residence of claimant is fatally defective, in that it fails to give the municipal corporation correct information on which it may ascertain the extent and nature of the injury sustained, for the reason that where on the trial on an action such questions are controverted, a definite and correct statement of such residence would be of co-ordinate importance with a similar statement of the place where the accident occurred.

16. MUNICIPAL CORPORATIONS, § 1225\*—*when notice to city giving wrong residence of claimant not unable by proof of residence elsewhere.* Where a notice is given in pursuance of Hurd's Rev. St., ch. 70, sec. 7 (J. & A. ¶ 6190), requiring persons intending to commence an action against a municipal corporation for personal injuries to give certain notice to such municipal corporation before bringing an action, and where such notice is defective in that it states the residence of claimant to be at a named place where claimant in fact never resided, such defect cannot be cured by proof that claimant

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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actually resided at some other place on the street named in the notice as that on which claimant resided, as the cause of the invalidity of the notice is the failure to state correctly the place where claimant in fact resided.

17. MUNICIPAL CORPORATIONS, § 1223\*—*what is object of statute relative to notice to city of personal injuries.* The object of Hurd's Rev. St., ch. 70, sec. 7 (J. & A. ¶ 6190), requiring persons intending to bring an action against a municipal corporation for damages for personal injuries to give to such municipal corporation certain notice before bringing an action, is to furnish timely notice to such municipal corporation of the fact that the party giving the notice claims to have sustained injuries for which he proposes to enforce a claim against such municipal corporation by suit, so as to enable such municipal corporation to investigate such claim while the facts are fresh and the justice of the claim may be readily ascertained.

18. MUNICIPAL CORPORATIONS, § 1224\*—*when provision relative to notice to city of personal injuries condition precedent to maintenance of action.* Hurd's Rev. St., ch. 70, sec. 7 (J. & A. ¶ 6190), requiring persons intending to commence an action against a municipal corporation for personal injuries to give certain notice to such municipal corporation before bringing an action is mandatory and is a condition precedent to maintaining an action to recover for such injuries.

19. MUNICIPAL CORPORATIONS, § 1233\*—*when giving of statutory notice to city of injuries must be averred and proved.* In an action against a municipal corporation to recover for personal injuries, the giving of the notice required by Hurd's Rev. St., ch. 70, sec. 7 (J. & A. ¶ 6190), to be given to such corporation in such case before bringing an action must be both averred and proved.

Appeal from the Circuit Court of Kane county; the Hon. C. F. IRWIN, Judge, presiding. Heard in this court at the October term, 1914. Reversed with finding of facts. Opinion filed September 18, 1915.

J. BRUCE AMELL and ALSCHULER, PUTNAM & JAMES, for appellant.

MIGHELL, GUNSUL & ALLEN and SEARS & SOLFISBURG,

MR. JUSTICE NIEHAUS delivered the opinion of the court.

This is an action on the case commenced by Jacob Swenson, the appellee, in the Circuit Court of Kane county, against the appellants, the City of Aurora, to

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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recover damages for injuries which appellee claims he received by inadvertently stepping into a hole in a defective sidewalk, situated on the west side of LaSalle street between Washington street and North avenue, in front of a place called Jennings Seminary, and located about fifty feet north of the intersection of North avenue and LaSalle street.

Appellee claims that the injuries which he received by the fall resulted in a permanent stiffening of his left knee and ankle joints. There are many controverted questions of fact in the case, arising from the evidence, as to the size and depth of this so-called hole, and as to whether or not it was of such a character as to be dangerous to pedestrians exercising due care, also as to whether or not appellee proved that the alleged fall upon the sidewalk was the proximate cause of the injuries from which he claims to be suffering. The nature and extent of appellee's injuries was also a contested question, and as to whether or not the stiffening of appellee's joints was the result of the injuries which appellee received from the fall on the sidewalk, or were the result of another accident which happened to him about six months later, in which he suffered a fracture of the thigh. All these controverted questions and others of a like nature were matters for the determination of the jury, and the findings of a jury upon questions of this kind, arising from the evidence, are rarely disturbed by a court of review, unless the findings appear to be unreasonable, or it is apparent that they result from passion or prejudice existing in the minds of the jury.

An objection is made by appellant to the declaration in the case, and it is claimed that it is insufficient because it does not charge that LaSalle street, in the City of Aurora, is a *public* street. But this objection is not well taken. The Supreme Court in the case of *Carlin v. City of Chicago*, 262 Ill. 566, has adjudicated this matter. It was there held that the word "street" is



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a generic term, which includes within its meaning "all public roads or ways within a municipality over which the municipality has jurisdiction, and to which it owes a public duty of exercising reasonable care to keep and maintain them in a reasonably safe condition for public use."

On the trial of the case in the court below, the appellee was permitted by the court to exhibit to the jury his injured limb, and we perceive no legal impropriety in this; however, having voluntarily put his injured limb in evidence before the jury, it became appellant's right not only to examine it by means of sight, but also to make a physical examination of the limb by its physician (who was present) under such reasonable restrictions as the trial court might see fit to require. The refusal of the court to allow such physical examination, under the circumstances, was error. *Pronskevitch v. Chicago & A. Ry. Co.*, 232 Ill. 136.

But appellee's right to recover against the appellant was dependent upon giving a notice of his claim, as required by section 7 of an "Act concerning suits at law for personal injuries and against cities, villages and towns. Approved May 13, 1905, and in force July 1, 1905." (Chapter 70 of the Revised Statutes of 1913, J. & A. ¶ 6190.) In the case of *Reichert v. City of Chicago*, 169 Ill. App. 493, five essential elements are emphasized as necessary to constitute a valid notice of this kind, viz.:

- (1) The name of the person to whom such cause of action has accrued.
- (2) The name and residence of the person injured.
- (3) The date and about the hour of the accident.
- (4) The place or location where such accident occurred.
- (5) The name and address of the attending physician (if any).

The notice which appellee gave to the appellant in



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this case was deficient in at least three of the requirements mentioned:

(1) The description of the place does not definitely locate the place where the hole in the sidewalk was situated.

(2) The hour of the accident is definitely fixed at 5:30 in the afternoon, and according to the proof the injury occurred at about 8:30 in the evening.

(3) The notice did not state the residence of the appellee, the person injured.

The statement in the notice of the location of the hole in the sidewalk into which appellee claimed he stepped and stumbled is given as follows: "Said hole being located upon the west side of said LaSalle street, between North avenue and Washington street, and opposite Jennings Seminary, in the city aforesaid." In the area of sidewalk covered by the description, there may have been a large number of holes. The appellee testified that the hole in question was located in the sidewalk, about fifty-five feet north of the corner of North avenue. This testimony fixes the location with sufficient definiteness, and no reason is apparent why the appellee could not have fixed the location with equal definiteness in his notice to the appellant. "To be legally sufficient, a notice of this kind must contain a sufficiently definite description of the place of the accident to enable the interested parties to identify it from the notice itself." *Benson v. City of Madison*, 101 Wis. 312. In this *Benson* case, *supra*, the description refers to the place where the accident occurred in the following words: "On the south side of State street at the intersection of State street and Fairchild street." It was held to be insufficient, and the court in passing upon the point made use of this language: "The notice in this case is most vague, uncertain and indefinite when applied to the facts proven on the trial and found by the jury. The recovery sought is based upon alleged imperfections in a crosswalk 'on the south

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side of State street at the intersection of State street and Fairchild street.' This description of the location might have been sufficient if the remainder of the notice had described the insufficiency in such terms as to enable the city authorities to determine on which side of Fairchild street it was to be found."

In passing upon the lack of definiteness, in a similar notice, in the case of *Lee v. Village of Greenwich*, 48 N. Y. App. Div. 391-394, the court says: "If the notice is designed to answer any useful purpose, by way of calling the attention of the authorities to the actual facts and conditions which existed at the time and place, and which caused the accident, and so aid them in forming a judgment as to settlement, it is plain that such a notice as to accidents of this nature should be, as to 'time' and 'place,' specific and not general, and should be as definite and exact as the claimant can reasonably make it. Such a notice is conclusive upon the claimant in any action afterwards brought for injuries sustained; the time and place cannot be shifted to suit conditions on other days and at other places."

In the case of *Reichert v. City of Chicago, supra*, the claimant notified the city that he was "injured by a defective street lamp \* \* \* at and near the intersection of LaSalle street and Madison street, in the City of Chicago." And the description was held not sufficiently definite.

It may be said concerning appellee's statement in the notice of the hour at which the accident occurred that it was not necessary to state the hour definitely. The statute only requires a statement of "about the hour"; but, when the claimant does undertake to state the hour definitely, and states it definitely wrong, then such statement becomes detrimental instead of beneficial to the city, for the purpose for which it is required by the statute; that is to say, instead of giving the city as nearly a correct idea of the hour as the claimant could give, it suggests a positively incorrect

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idea on that subject, and so, instead of leading the city to the facts in its investigation, it misleads it. So far as the practical effect is concerned, the city is in no better position than if no hour had been stated, and a failure to state the hour of the accident renders the notice fatally defective. *Zycinski v. City of Chicago*, 163 Ill. App. 413; *Condon v. City of Chicago*, 249 Ill. 602. And defects of this kind cannot be cured by showing that the city was not actually misled. *Ouimette v. City of Chicago*, 242 Ill. 501.

But the most serious defect in the notice in question is the failure of appellee to state his place of residence. The residence given in the notice was not his and never had been. The omission of the place of residence is clearly fatal to the validity of the notice. And it is clear that this defect cannot be cured by the showing that he resided at some other place on the same street, for it is the very fact that he resided at some other place than the one mentioned in the notice that renders the notice invalid. Unquestionably, the purpose which the Legislature had in view in requiring the notice to state the name and residence of the party injured and the name and address of the attending physician was to give cities, towns and villages in cases of this kind correct information, upon which they could properly pursue their investigation, to ascertain the extent and nature of the injury suffered by the person injured, which in many cases might become, as it did on the trial of this case, an important and controverted question. It is evident, therefore, that a definite and correct statement as to the residence of the party injured, in the notice, is of co-ordinate importance with a correct and definite statement of the place where the injury occurred.

“The object of the statute is to furnish timely notice to the city, village or town of the fact that the party claims to have sustained an injury and that he proposes to enforce his claim for damages against said city, village or town by suit, and thereby enable the

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city, village or town to investigate the claim while the facts are fresh and the justice of the claim can be readily ascertained.” *Donaldson v. Village of Dieterich*, 247 Ill. 526.

The courts of this State have always insisted on the necessity of a strict compliance with the requirements of this statute, concerning the notice under discussion. The statute is mandatory, and the giving of a notice, such as the statute prescribes, is a condition precedent to the maintenance of a suit for personal injury against a city, village or town; and the giving of such notice must be averred and proved, otherwise the suit will be dismissed and a recovery barred. *Erford v. City of Peoria*, 229 Ill. 546; *Ouimette v. City of Chicago*, 242 Ill. 501; *Schoeler v. City of Rockford*, 160 Ill. App. 217.

For the reason stated the statutory notice given to appellant in this case is clearly and fatally deficient, and the judgment must therefore be reversed.

*Reversed with finding of facts.*

Finding of facts to be incorporated in the judgment.

We find from the evidence: That the description in the statutory notice to appellant of the place where the injury occurred is not sufficiently definite.

That the hour of the accident is incorrectly stated in the notice. It purports to state the hour exactly, but the accident did not occur within three hours later.

That the residence of the appellee, the person injured, is not stated in the notice. The place of residence stated in the notice was not appellee's residence and never had been.

That for failure by appellee to give appellant the notice required by law, he has no cause of action against appellant.

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Welch v. New Harper Hotel Co. et al., 196 Ill. App. 94.

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**Bridget Welch, Appellee, v. New Harper Hotel Company and Memie DeSilva, Appellants.**

**Gen. No. 6,018.**

1. NEGLIGENCE, § 142\*—*what is doctrine of res ipsa loquitur.* Where a thing which is alleged to have been the cause of an accident is shown to have been under the management of defendant or his servants, and the accident is one which in the ordinary course of things does not happen when those having the management of the thing use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care.

2. NEGLIGENCE, § 142\*—*when doctrine of res ipsa loquitur inapplicable.* The rule of *res ipsa loquitur* has no application to a case where the thing alleged to have been the cause of an accident does not require direction or management in its operation and use, such as, for example, an electrical appliance used to furnish power for elevators, which appliance is stationary, and works automatically without manipulation and without the need of an interposing or independent agency to direct the performance of its functions.

3. NEGLIGENCE, § 140\*—*when burden of proof on plaintiff to sustain charge of negligence.* Where an action is based on specific charges of negligence, plaintiff has the burden of proving such specific charges as laid.

4. MASTER AND SERVANT, § 584\*—*when no presumption of negligence arises from occurrence of fire.* In an action by a servant to recover for personal injuries due to a fire alleged to have been started as a result of defendant's negligence, the fact that a fire occurred whereby plaintiff was injured raises no presumption of negligence.

5. MASTER AND SERVANT, § 687\*—*when evidence insufficient to establish application of doctrine of res ipsa loquitur.* In an action to recover for personal injuries sustained as a result of a fire which was alleged to be due to the negligence of defendant, where plaintiff invoked the rule of *res ipsa loquitur*, evidence held to have no tendency to show that the accident was due to the "management" of defendant or its servants even though the word "management" used in the rule invoked can be construed as having the same meaning as "use," where the thing from which the fire in question was alleged to have originated was an electrical appliance used to furnish power for elevators, which worked automatically and without manipulation, as it is clear that such appliance in the ordinary course of its use by defendant would not be likely to cause a fire.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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6. **MASTER AND SERVANT, § 687\***—*when evidence sufficient to repel presumption that use of elevator power furnishing appliance involved danger from fire.* In an action to recover for personal injuries sustained as a result of a fire alleged to be due to defendant's negligence, where plaintiff invoked the rule of *res ipsa loquitur*, and where the fire was alleged to have originated from an electrical appliance used to furnish power for elevators, and which worked automatically without manipulation or management by defendant or its servants, evidence that such appliance had been in daily and safe use for ten years *held* to repel any just assumption that the use of such appliance involved danger from fire.

7. **MASTER AND SERVANT, § 687\***—*when evidence insufficient to establish negligence in management or construction of elevator power furnishing appliance.* In an action by a servant to recover for personal injuries sustained as a result of a fire alleged to have been due to defendant's negligence, where the specific facts relied on as proving negligence were the improper management and construction of an electrical appliance used to furnish power to elevators, from which the fire was alleged to have originated, evidence *held* insufficient to prove negligence, there being no evidence of improper construction of such appliance, or that the fire was caused thereby, and it appearing that such appliance worked automatically, without management by defendant.

8. **MASTER AND SERVANT, § 699\***—*when evidence sufficient to sustain finding of contributory negligence in failing to escape from burning building.* In an action by a servant to recover for personal injuries as the result of a fire alleged to have been caused by the negligence of defendant, where the fire occurred in a hotel belonging to defendant wherein plaintiff was employed as a chambermaid, evidence *held* conclusively to show a want of due care for her own safety on the part of plaintiff, where it appeared that plaintiff had ample time and opportunity to escape after the commencement of the fire in question, but, although urged to do so, plaintiff made no effort to escape until the flames reached the place where she persisted in remaining.

9. **NEGLIGENCE, § 66\***—*what constitutes contributory negligence.* One who voluntarily exposes himself to a danger of which he has knowledge, or who fails to exercise ordinary precautions to avoid such danger, thereby bars a recovery for injuries resulting therefrom.

Appeal from the Circuit Court of Rock Island county; the Hon. ROBERT W. OLMSTEAD, Judge, presiding. Heard in this court at the October term, 1914. Reversed with finding of facts. Opinion filed September 13, 1915.

SEARLE & MARSHALL, for appellants.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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MURPHY & LARSON and J. T. & S. R. KENWORTHY,  
for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

In this case the appellee, Bridget Welch, sued the appellants, the New Harper Hotel Company and Memie DeSilva, the owner of the hotel building, in the Circuit Court of Rock Island county, to recover damages for injuries suffered by her as the result of a fire which took place in the hotel on December 10, 1910.

The fire originated in the attic of the hotel about noon on the day mentioned. In this attic an electrical appliance and equipment had been installed and was in use for the purpose of running a passenger elevator. It had been placed on a platform built of wood and supported by wooden timbers, and was located at the top of the elevator shaft, about six or eight feet above the floor of the attic. The appellee was employed in the hotel by the Hotel Company as a chambermaid, and at the time of the fire was pursuing her employment on the fifth floor, which is immediately under the attic floor.

There is a hallway running through the center of the main wing of the hotel, and the elevator is situated about one-third of the way from one end of this hallway, where another hallway branches off at right angles. This hallway which branches off runs through the center of the other wing of the hotel and at the end of it there is a stairway leading down to the floors below. There is also a stairway leading to the floor below directly opposite the elevator.

The fire was first noticed by one of the chambermaids in the hotel, and she gave the alarm and called the appellee, who came to the elevator. The appellee noticed the fire, which at that time was in the attic and apparently near the top of the elevator shaft, and the shaft appeared to be on fire near the top, also the floor



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of the attic near the shaft. The appellee thereupon got her clothes out of the "pantry," which was near the elevator shaft, and took them down the hall into a room situated at the far end of the hallway, and away from the elevator and stairway. She claims that when she came out of this room, which she says was room 71, the hallway had become filled with smoke, and she had to grope along the hallway in trying to escape through the smoke, and in that way she must have come in contact with the flames, which by that time had reached down the elevator shaft to the fifth floor. She was severely burned about the face and hands, wrists and arms, and elbow, and some permanent scars and injuries resulted therefrom.

The electrical appliance and equipment mentioned was a motor with connecting wires carrying a 500-volt direct current of electricity, and a ground return. It had been installed in the hotel about ten years before the fire and had been in daily use during all that time. It was the kind of appliance and equipment that was in general use at the time it was installed, and was then used in most of the larger buildings, public and private, in and about the City of Rock Island and adjoining cities.

The declaration consisted of three additional counts filed by the appellee, the original count having been eliminated from the case by a demurer, which had been confessed by the appellee and sustained by the court. Each of the additional counts contained a distinctive charge of negligence and an averment of due care on the part of the appellee.

The first count charges: "That the defendants so recklessly, negligently and unskillfully managed the said machinery and electrical equipment erected at the top of said elevator shaft that the same became ignited and set fire to the portion of said building surrounding said elevator shaft."



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The second count charges: "That said elevator and said electrical devices and equipments had been changed, remodeled and repaired and installed by the said defendants acting jointly shortly before the day last aforesaid, and that in so remodeling and repairing said electrical devices and equipments, the said defendants made use of and installed on the inside of said building, and close to and around a certain elevator shaft in the front part of said building, a large number of wires for the purpose of carrying the electricity, and it then and there became and was the duty of the said defendants to properly insulate and protect said wires and take all reasonable precaution to keep the said wires properly insulated and guarded while so used with the electrical current as aforesaid, and that the defendants did not take reasonable precaution to guard said wires, and did not keep and maintain said wires properly insulated."

The third count charges: "That the fuse connecting up the said elevator machinery with the electrical current had burned out, and that it was the duty of the defendants to replace said fuse with another safe and approved inclosed fuse; that the defendants neglected to do this, but connected up the said machinery with said current with a piece of wire or other metal, which rendered said electrical machinery and equipment unsafe and liable to be excessively charged with electrical current."

The appellants filed a plea of the general issue to these three counts, and upon issue joined, a trial by jury was had, which resulted in a verdict finding the appellants guilty, and assessing appellee's damages at \$4,500. The appellants made a motion to set aside the verdict and for a new trial, which was overruled by the court, and a judgment was rendered upon the verdict. The case was then brought to this court on appeal. Two questions appear to stand out prominently for consideration in review of this case, namely,

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whether or not there is any evidence to sustain the charges of negligence in the declaration, and whether or not the injuries sustained by appellee were occasioned by her own lack of care and caution.

On the question of the proof of negligence it is insisted by appellee that the rule of *res ipsa loquitur* applies. This rule has been tersely defined as follows: "Where the thing is shown to be under the management of the defendant, or his servants, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." *Scott v. London Docks Co.*, 3 Hurl. & Colt. 596.

The electrical appliance and equipment in use in the hotel consisted of a motor and connecting wires. There was no management required in its use. It was stationary, and acted automatically without manipulation. The application of an interposing or independent agency was not needed to direct the performance of its function, which was to furnish the power to run the elevator of the hotel. Where the apparatus is one that does not require direction or management in its operation and use, as in this case, it is evident that the rule of *res ipsa loquitur* can have no application. And we are unable to perceive anything in the nature of this case which would take it out of the general and well-established rule that where a plaintiff bases a right of recovery upon specific charges of negligence, which are set out in the declaration, such specific charges must be proved as laid; and the burden of proof is upon the plaintiff. (*Ebsery v. Chicago City Ry. Co.*, 164 Ill. 518; *La Salle County Carbon Coal Co. v. Eastman*, 99 Ill. App. 495; *Geraghty v. William Grace Co.*, 157 Ill. App. 309.)

If the electrical appliance in question set fire to the hotel, it is clear that it was not in consequence of any

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management or manipulation on the part of the appellants or their servants. If, however, the term "management" could be construed to have the same meaning as the "use" of the appliance and equipment, it is just as clear that this appliance and equipment, in the ordinary course of its use by the appellants, would not likely cause a fire. The fact that it had been in daily and safe use in the hotel for as long a period as ten years would of itself do away with any just assumption that there was any fire danger from its use. And there is no proof that the electrical appliance caused the fire. The fact that a fire occurred would not of itself raise any presumption of negligence. (*Bryan v. Fowler*, 70 N. C. 596.)

There is no evidence in the record of the negligence charged in the first count of the declaration, nor is there any evidence to show that the electrical devices or equipment in question were out of repair, or that the wires, which were a part of the equipment, were not properly insulated and guarded, as charged in the second count of the declaration. And we find no evidence to show that a fuse connecting the electrical machinery with the electrical current used had been burned out, and had been replaced by a piece of wire or other metal instead of another safe and approved fuse, as charged in the third count of the declaration. None of the allegations of negligence made in the three counts of the declaration are proved, and hence there is no evidence to sustain the verdict or the judgment.

On the question of lack of due care and caution on the part of appellee for her own safety, the evidence is conclusive. It is clear that she had ample time and opportunity to get away from the fire in safety, but that she persisted in remaining in the proximity of the danger, and in spite of repeated warnings and entreaties to come away she voluntarily remained on the scene, and not until the spreading flames and smoke came down the hallway of the fifth floor did she make any

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effort to escape. She admits, in her own testimony, that after her attention had been called to the fire she could have gone away from it with perfect safety. Her testimony on that point on page 23 of the abstract, is as follows:

“X. Q. Was there anything to hinder you then from walking right down that stairway?

“A. No more than the other stairway, but I went to 71.

“X. Q. Just answer the question. Was there anything to prevent you after you got your clothes, from walking to the west end of this hallway and going down that stairway?

“A. No, sir.

“X. Q. And you could have gone out that way at that time in perfect safety, couldn't you?

“A. Yes.”

It was her duty to look out for her safety, and to withdraw from the danger as soon as she had knowledge of it; and if she failed to do so, and voluntarily continued to expose herself to such danger, she did so at her own risk. Having been injured because of her own neglect, she has no one to blame but herself. One who voluntarily exposes himself to a danger of which he has knowledge, or fails to exercise ordinary precautions, thereby bars a recovery. (*Chicago & E. I. Ry. Co. v. McKnight*, 16 Ill. App. 596; *Schoeler v. City of Rockford*, 160 Ill. App. 224.)

The judgment in this case is therefore reversed.

*Reversed with finding of facts.*

Finding of facts to be incorporated in the judgment.

We find from the evidence that appellant is not guilty of the negligence charged in the declaration, and that appellee was injured because of her own lack of due care for her own safety; and that appellee has no cause of action against appellant for the injuries alleged in the declaration.

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Callagan et al. v. American Trust & Savings Bank, 196 Ill. App. 102.

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**William Callagan et al., Appellees, v. American Trust  
& Savings Bank, Appellant.**

**Gen. No. 6,029.**

1. **CHATTEL MORTGAGE, § 167\***—*when mortgagor has no estate in mortgaged property.* After default and after possession taken by the mortgagee of personal property, the mortgagor has no estate in the mortgaged property.

2. **CHATTEL MORTGAGE, § 167\***—*what is estate of mortgagee taking possession after default.* When, after default in a mortgage of personal property, mortgagees take possession of such property, their title thereto becomes absolute and they become the legal owners thereof.

3. **TRESPASS, § 23\***—*what possession of personal property sufficient to maintain action.* Although possession of personal property is necessary as matter of law in order to enable the owner thereof to maintain trespass against one in wrongful possession, yet actual possession of such property is not necessary to maintain the action, constructive possession being sufficient.

4. **TRESPASS, § 23\***—*when mortgagee of personal property may maintain trespass.* Mortgagees of personal property who after default have taken possession and have thereby acquired title to the mortgaged property are in constructive possession of such property so as to maintain trespass against one having unlawful possession thereof, where it appears that such owners were ousted of possession by the seizure of such property on an execution against the mortgagor, and where it further appears that such property was subsequently seized by the receiver in bankruptcy of such mortgagor as the property of such bankrupt.

5. **EVIDENCE, § 159\***—*what constitutes an admission in a pleading in a former trial.* In an action of trespass by mortgagees of personal property, who after default have taken possession thereof, brought against the receiver in bankruptcy of such mortgagor, where it appears that after plaintiffs had been ousted of their possession of such property by a levy thereon on an execution against such mortgagor defendant seized such property as the property of the bankrupt, an averment by defendant in a verified petition filed in such bankruptcy proceedings for an injunction to restrain further prosecution of such action of trespass that plaintiffs had such possession is a direct admission that when defendant seized the property in question it took it from the possession of plaintiffs.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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6. **TRESPASS, § 29\***—*When officer taking personal property a trespasser.* Where mortgagees of personal property have acquired the legal title and ownership of such property by taking possession after default, an officer seizing the property on an execution against such mortgagor is a trespasser.

7. **TRESPASS, § 29\***—*when trustee in bankruptcy taking personal property from officer becomes a trespasser.* Where mortgagees of personal property have acquired the legal title and ownership thereto by taking possession of such property after default, and where such mortgagees are ousted of possession thereof by a levy thereon on an execution against such mortgagor, but secured possession by giving a forthcoming bond, the receiver in bankruptcy who takes possession of such property from such officer as the property of the bankrupt becomes a trespasser as to such mortgagees.

8. **TRESPASS, § 10\***—*what constitutes a trespass to personal property.* Any unlawful exercise of authority over the goods of another will support an action of trespass, even though no physical force be exercised.

9. **TRESPASS, § 29\***—*when action lies against subsequent trespasser.* Any person having the legal ownership of personal property may maintain trespass against a subsequent trespasser as well as the first.

10. **TRESPASS, § 29\***—*when trustee in bankruptcy taking possession of property from officer a trespasser.* Where mortgagees of personal property have extinguished the title of the mortgagor and perfected title in themselves thereto by taking possession of the mortgaged goods after default, the receiver in bankruptcy of the mortgagor who seizes such property as the property of such bankrupt is none the less a trespasser by reason of the rule that an officer acting in the line of his duty and within the scope of his authority is not liable personally for his acts, for the reason that defendant's authority under the order of the bankruptcy court extended only to taking possession of the property of the bankrupt and did not extend to property of plaintiffs, so that defendant therein exceeded its authority.

11. **APPEAL AND ERROR, § 1764\***—*when Appellate Court no power to increase judgment.*

The Appellate Court has no power to increase the amount of a judgment.

Appeal from the Circuit Court of LaSalle county; the Hon. EDGAR ELDRIDGE, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed September 13, 1915. Rehearing denied October 21, 1915. *Certiorari* denied by Supreme Court (making opinion final).

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Callagan et al. v. American Trust & Savings Bank, 196 Ill. App. 102.

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ROSENTHAL & KURZ, for appellant; DUNCAN & O'CONOR, of counsel.

CHARLES S. CULLEN and JOHN H. ARMSTRONG, for appellees.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

This is an action of trespass, commenced in the Circuit Court of LaSalle county, by appellees William Callagan and Joseph Armstrong, copartners, doing business as Callagan & Armstrong, against the American Trust & Savings Bank, appellant. The case was tried by the court, a jury having been waived; and after hearing all the evidence the court found the issues in favor of the appellees, and assessed their damages at the sum of \$1,031.27. After a motion for a new trial and a motion in arrest of judgment had been made by the appellant, and denied by the court, judgment was entered by the court for the amount of the damages assessed, and an appeal was thereupon taken to this court.

The evidence shows, that on or about August 14, 1909, Louis E. Fitzgerald was conducting a retail boot, shoe and clothing store at Sheridan in LaSalle county; and that on the day mentioned he executed and delivered to the appellees a chattel mortgage on certain personal property, which included his stock of goods. The mortgage was given to secure an indebtedness of \$850, and the chattel mortgage was in the usual form and properly acknowledged and recorded, as required by the statute.

On August 22, 1909, a levy was made on the Fitzgerald automobile at Ottawa, but one of the appellees secured its release from the levy by signing a forthcoming bond for Fitzgerald. The next day, on the 23rd of August, the appellees, feeling themselves insecure in consequence of the levy which had been made, took possession of all the property described under



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the provisions of the mortgage, and put one of their employees in charge of the store and in custody of the property mentioned; and this was done with the consent of the mortgagor. Then, on August 24th, Charles R. Rowison recovered a judgment in the Circuit Court of LaSalle county against Fitzgerald for \$73.95, and an execution was issued to the sheriff and placed in the hands of the deputy sheriff to execute. The deputy sheriff found the appellees in possession of the Fitzgerald store and the property covered by the mortgage; but, nevertheless, he insisted upon making a levy of the execution and finally, by threatening to break down the door of the store, obtained the keys of the store from appellees and seized the stock of goods. He then placed a padlock on the door and put his own custodian in charge of the property. On August 28, 1909, bankruptcy proceedings were instituted against Fitzgerald in the United States Court at Chicago, by the Superior Brass and Fixture Company, and other creditors; and in these proceedings appellant was appointed by the court as receiver of the property and effects of Louis E. Fitzgerald, the alleged bankrupt.

The appellant, immediately upon its appointment, sent its agents down to Sheridan to take possession of the goods and property of Fitzgerald. Upon arriving at Sheridan these agents, under instructions from appellant, induced the sheriff to turn over the keys of the store to them, and thereupon seized the stock of goods and property in question, and against the will and in spite of the protest and objection of appellees, removed the property from the store and from the county to Chicago, where it was disposed of in some way.

It is well settled that the mortgagor, after default and after possession taken by the mortgagee, no longer has any legal estate in the mortgaged property. (*Frankenthal v. Meyer*, 55 Ill. App. 405; *Kenyon v. Shreck*, 52 Ill. 382; *Simmons v. Jenkins*, 76 Ill. 479; *McConnell v. People*, 84 Ill. 583.)



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By taking possession of the mortgaged property in this case under the conditions of their mortgage, the title of the appellees to the mortgaged property became absolute, and they became legally the owners of the same. (*Durfee v. Grinnell*, 69 Ill. 371; *Whittemore v. Fisher*, 132 Ill. 257; *Constant v. Matteson*, 22 Ill. 559.)

The principal point made by the appellant in urging a reversal of the judgment in this case is that the appellees cannot legally maintain an action of trespass, because, at the time the property in question was seized by the appellant, the appellees did not have actual possession of the property. While possession is necessary as a matter of law, as a basis for maintaining an action of trespass, such possession in case of a legal owner need not be actual but may be constructive. (1 Chitty, 168.)

There can hardly be much doubt about the fact that appellees had possession of this property. It is not only clearly shown by the evidence but the appellant, after it had seized the property, averred it to be a fact in a verified petition, which it filed in the bankruptcy proceedings in which it was appointed receiver, for an injunction to restrain the prosecution of this suit. This averment in the petition was not only a direct admission by appellant but a direct assertion under oath that it took this property from the possession of the appellees. It is clear that the sheriff by levying the execution upon this property, which was in the possession of the appellees and to which they had acquired the legal title and ownership, became a trespasser. (*Pike v. Colvin*, 67 Ill. 227; *Durfee v. Grinnell*, 69 Ill. 371; *Simmons v. Jenkins*, 76 Ill. 479.) And the appellant in taking this property from the hands of the sheriff, and by forcibly removing it against the will and objection of the appellees from the premises and from the county, and by thus depriving appellees of their property, was also guilty of trespass. Any

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unlawful exercise of authority over the goods of another will support a trespass, even though no physical force is exercised. (*Chicago Title & Trust Co. v. Core*, 223 Ill. 58.) And the person having legal ownership may maintain an action for trespass, for taking his property, against the second trespasser as well as against the first. (*Cox v. Hall*, 18 Vt. 191.)

It is also insisted that in taking this property the appellant acted under the order of the United States Court, and as its officer, in its capacity as receiver, and that, therefore, it cannot be made personally liable. It is true that an officer who acts in the line of his duty and within the scope of his authority is not liable personally. But in this case, appellant's authority, under the court order, extended only to the taking possession of the property of Fitzgerald, and did not include a right to seize any of the goods and chattels legally belonging to appellees. By doing so it clearly exceeded the authority received through the order of the court, and became a trespasser. (*Pike v. Colvin*, 67 Ill. 229.)

The appellees have assigned cross-errors, claiming that they are entitled to recover the full value of the property taken and that, therefore, the amount of the judgment should have been at least \$1,800, and they ask this court to increase the amount of their judgment. Inasmuch as this court has no power to increase the amount of the judgment, there is no occasion to consider the questions raised by the cross-errors.

We find no reversible error in the record, and the judgment should therefore be affirmed.

*Judgment affirmed.*

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Payne v. Brownlee et al., 196 Ill. App. 108.

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**William Payne, Appellant, v. Bruce L. Brownlee et al.,  
Jennie McNamara and J. W. Duncan, Appellees.**

**Gen. No. 6,037.**

1. **EXECUTION, § 64\***—*how right of priority of lien lost.* Any act of an execution creditor which diverts such execution from its proper purpose renders it dormant and inoperative as against other creditors and clothes them with priority as against it, since the object of an execution is to obtain satisfaction of the judgment on which it issues.

2. **EXECUTION, § 64\***—*how execution rendered presumptively fraudulent as to junior executions and writs.* An attempt to make use of an execution for the purpose of obtaining merely security for the payment of the debt, although without fraudulent intent, renders the execution presumptively fraudulent as to junior executions and writs.

3. **EXECUTION, § 70\***—*when right to priority of lien not waived.* In a bill to foreclose a mortgage of personal property wherein the relative priority of an execution creditor over junior incumbrancers was involved, and where it appeared that an officer having the execution demanded and took security therefor, the execution creditor *held* not to have waived her priority, it appearing that such action of the officer was without the knowledge or consent of such creditor, but on the contrary he insisted on a levy thereof being made and the debt collected through its instrumentality.

4. **CHATTEL MORTGAGES, § 85\***—*when mortgagee having no knowledge of fraud of mortgagor obtains legal title.* One whose title to personal property was obtained by fraud can give a chattel mortgage thereof and transfer a good legal title thereby to a mortgagee who is not a party to and has no knowledge of the fraud, and who takes the mortgage in good faith.

5. **CHATTEL MORTGAGES, § 156\***—*when not entitled to priority over lien of execution.* In a bill to foreclose a chattel mortgage wherein the relative priority of liens senior to such mortgage was involved, where the lien of an execution was held to be first in priority, a decree holding the lien of a chattel mortgage which was valid, and prior in time to the lien of the mortgage sought to be foreclosed to be the second in order of priority, *held* proper.

6. **EXECUTION, § 67\***—*when entitled to priority over chattel mortgage.* In a bill to foreclose a chattel mortgage wherein the relative priority of liens senior to such mortgage was involved, a decree holding that the lien of an execution was first in priority *held* correct, where it appeared that the lien of such execution was first in point

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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of time and where there was no evidence of a waiver of such priority.

7. CHATTEL MORTGAGES, § 87\*—*when fraudulent as to creditors.* A chattel mortgage given by one to whom property has been transferred in fraud of creditors is invalid as being in fraud of creditors where the mortgagee is a party to the fraud or has knowledge of the fraudulent purpose with which such property was transferred to such mortgagor.

8. SALES, § 187\*—*when manual possession of crops by purchaser not necessary.* A transfer of title to an interest in growing corn is complete without a taking of manual possession thereof by the transferee.

Appeal from the Circuit Court of Warren county; the Hon. ROBERT J. GRIER, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed September 13, 1915.

HANNA & LAUDER, for appellant.

L. E. MURPHY, for appellee Jennie McNamara.

HANLEY & Cox, for appellee J. W. Duncan.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

This is an appeal from a decree entered by the Circuit Court of Warren county, in a foreclosure proceeding, fixing the priorities of certain liens claimed by the parties to this proceeding in the undivided half of the growing corn on ninety-five acres, the undivided half interest in the corn being the property of the debtor, Bruce L. Brownlee. Before the controversy arose, Bruce L. Brownlee had become indebted to the several parties to this suit. He had become indebted to appellant, William Payne, upon two promissory notes: one dated January 4, 1913, for \$511, and due October 1, 1913; and another dated January 17, 1913, for the sum of \$200, due October 17, 1913.

These notes had been secured by a chattel mortgage on certain horses and cattle owned by Brownlee. He had also become indebted to C. A. McLaughlin upon a promissory note for the sum of \$136, which was also secured by a second chattel mortgage on the property

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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covered by the mortgage to Payne. But the indebtedness represented by this note and mortgage was finally acquired by the appellant, Payne, and became a part of the claim which he held against Brownlee at the time of the filing of the bill of complaint. Brownlee also owed the appellee Jennie McNamara \$290 for back rent, and she also turned over her claim against Brownlee to Ben Eilenberger, a constable, for collection. Eilenberger induced the appellee John W. Duncan to loan Brownlee \$150 upon a promissory note for that sum, due October 2, 1913, which was secured by another chattel mortgage on the chattels embraced in the mortgage to Payne. After obtaining the loan from Duncan, Brownlee was enabled to pay \$230 on the McNamara indebtedness, and this amount was paid to Eilenberger for her and credited by her upon the indebtedness. Brownlee then confessed a judgment for the balance of \$60, due Jennie McNamara, before a justice of the peace.

In the following year, on March 29th, Brownlee became indebted to the appellant, Payne, in the further sum of \$300, for which Brownlee gave him a promissory note of this amount, but no security was given for either of these notes at that time. On May 8th an execution was issued by the justice of the peace to Ben Eilenberger, as constable, on the McNamara judgment against Brownlee, and some efforts were made by the constable to collect it; but nothing was paid upon it, and the execution was subsequently returned "no property found," and then another execution issued to the constable on July 17, 1913.

Brownlee raised the ninety-five acres of corn in question in the year 1913, as a tenant on the so-called Ira Nichols farm, and it was laid by about the 10th of July, and in this corn he had an undivided half interest. On July 19th Brownlee executed a bill of sale to Peter M. Freed, who was his brother-in-law. The evidence shows that there was no consideration for

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this bill of sale, and that it was really executed for the purpose of putting off Brownlee's creditors and to gain further time to settle his obligations. After he made this transfer of his interest in the corn to Freed, he absented himself for a period of three weeks, and paid a visit to the State of Minnesota. When Eilenberger found out that Brownlee had transferred the ninety-five acres of corn to Freed, he went to Freed and threatened to make a levy, and to seize some of Brownlee's chattels unless Freed executed a chattel mortgage on the ninety-five acres of corn to Jennie McNamara and J. W. Duncan to further secure payment of their respective claims. Freed did execute a chattel mortgage to secure the payment of a note for \$54 payable to Jennie McNamara, and of a note of \$165 payable to J. W. Duncan, on August 15, 1914, mortgaging the undivided half interest of the ninety-five acres of growing corn in question. These papers were delivered to Eilenberger for the respective parties.

It may be well to say here, however, that the evidence clearly shows that Eilenberger had no authority from the appellee Jennie McNamara to take a note and chattel mortgage for her claim, which was represented in the execution he held as constable, at that time, and that she had no knowledge that he had taken such note and mortgage, and that she never in any way sanctioned nor ratified the act of taking it.

After Brownlee returned from his visit to Minnesota, he and the appellant Brownlee figured up the entire indebtedness held by Payne against him; and on August 23, 1914, Brownlee, in order to secure the payment of the whole indebtedness as agreed upon, gave to Payne another chattel mortgage on his chattels and included the ninety-five acres of growing corn in question. This latter chattel mortgage is the one on which the lien claimed by appellant in this proceeding is based. At the time the appellant took his second chattel mortgage, the execution in favor of the appellee

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Jennie McNamara was in the hands of Eilenberger, as constable, and was a lien on the corn in question, and it was a first and prior lien, unless the appellee in some way waived or forfeited her right to such a lien.

It is true as claimed by appellant, and a well-settled doctrine, that the object of an execution is to obtain satisfaction of the judgment on which it issues, and any acts of the creditor or direction from him or her to the sheriff or constable diverting an execution from its proper purpose renders it dormant and inoperative against other creditors, and clothes them with priority. (*Gilmore v. Davis*, 84 Ill. 487; *Koren v. Roemheld*, 6 Ill. App. 275; *Kellogg v. Griffin*, 17 Johns. [N. Y.] 274; *Knower v. Barnard*, 5 Hill [N. Y.] 377.) An attempt to make use of an execution, even without fraudulent intent, merely for the purpose of security is a perversion of the right, and renders it constructively fraudulent as to junior executions and writs. (*Everingham v. National City Bank of Ottawa*, 25 Ill. App. 645.) Nothing of that kind, however, is disclosed by the evidence in this case; in fact it is very evident that the appellee McNamara relied very strongly on the proper purpose of her execution, and insisted at all times upon having it levied, and the debt recovered through its instrumentality, and she never in any way appears to have waived her right to having it done. We think, therefore, that the Circuit Court was right in holding that the lien of the McNamara execution was first in the order of the liens involved. The appellee Duncan acquired his lien on the corn in question by the chattel mortgage executed by Peter M. Freed, and appellant claims that because the bill of sale, in which Brownlee's interest in the ninety-five acres of growing corn was transferred to Freed, was without consideration and fraudulent as to creditors, the chattel mortgage to the appellee Duncan was necessarily invalid. On the assumption that Duncan was a party to the fraud, or was a party to the fraudulent



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transfer to Freed, or had knowledge of its fraudulent purpose, this would be a correct statement of the rule, but the evidence does not show that he was a party to the fraudulent transfer, or had any knowledge of its fraudulent character. So far as he was concerned, or knew, Freed apparently had a legal title to the growing corn in question, by the execution and delivery of the bill of sale. And the title was legally complete, without Freed taking manual possession of the crop. (*Ticknor v. McClelland*, 84 Ill. 471.) Even if Freed did obtain the title of this property by means of fraud, he could legally transfer that title and create a valid lien, by giving a chattel mortgage upon it to a person who was not a party to the fraud and had no knowledge of it, and who accepted the mortgage given in good faith. (20 Cyc. 647; *Jewett v. Cook*, 81 Ill. 260; *Kranert v. Simon*, 65 Ill. 344.)

The chattel mortgage given by Freed to appellee Duncan appears to have been accepted by him in good faith, and without any knowledge of the fraudulent character of the bill of sale, and must, therefore, be regarded as valid. The lien of this mortgage attached to the corn, prior in time to the lien of the chattel mortgage taken by appellant. The court, therefore, properly found that Duncan's lien was second in the order of priorities.

We find no error in the adjustment of the priorities in the decree of the liens involved, and the decree should therefore be affirmed.

*Decree affirmed.*

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**LaSalle County Electric Railroad Company, Appellant,  
v. Alexander P. Wylie et al., Appellees.**

**Gen. No. 5,946. (Not to be reported in full.)**

Appeal from the Circuit Court of LaSalle county; the Hon. JOE A. DAVIS, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.



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### Statement of the Case.

Petition by the LaSalle County Electric Railroad Company, petitioner, against Alexander R. Wylie and others, defendants, in the Circuit Court of LaSalle county, to condemn a right of way across defendant Wylie's land. From an order that defendant Wylie recover costs and reasonable attorney's fees, fixed in the order at \$250, and from a denial in part of a motion to retax the costs, petitioner appeals.

Petitioner filed a petition in the Circuit Court of LaSalle county to condemn a right of way across a farm of one hundred and sixty acres owned by Alexander P. Wylie, and made defendants thereto said Wylie and his wife and his tenant. There was a trial and a verdict, fixing the compensation to be awarded, and a judgment in favor of petitioner, and the judgment limited the time within which the compensation fixed by the judgment should be paid, as authorized by section 10 of the Eminent Domain Act (J. & A. ¶5260), as amended in 1897. The petitioner has never paid the compensation awarded. Wylie filed such a petition after the expiration of the time fixed, and there was a hearing thereunder, and the court allowed him \$250 for his reasonable attorney's fees, and ordered that he should recover his costs, and that execution should issue unless paid within a certain time.

Wylie's attorney charged him \$350 for the services which he rendered, and the testimony of Wylie showed that he expected to pay that amount. There was testimony that this was the usual and customary fee, and testimony to the contrary. The court allowed \$250. So far as the record discloses, the services performed may be briefly stated thus: The petition to condemn was filed on August 26, 1912, and the attorney was thereafter employed by Wylie. An answer was filed September 9, 1912, amounting to no more than a pleading raising the question whether the petitioner had

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lawful authority to condemn, and, among other things, whether it had shown what kind of a railway it proposed to construct and by what power it proposed to operate, and it called attention to the fact that there were no maps, plats, profiles, or plans with the petition. From the whole record it appears that petitioner proposed to take thirty-three feet next west of the east thirty-three feet of Wylie's farm, and that there was a highway on the east side of his farm, and it is evident that the intention was to take the thirty-three feet next west of the highway across the whole front of his farm. Wylie's attorney made and argued a motion to dismiss the proceeding. He moved to strike the answer from the files and this was argued and denied, except as to the fifth paragraph thereof, which raised the question of the absence of the plans, etc., and of the failure to show in the petition whether the road was to be operated by steam, electricity or otherwise. Wylie's attorney obtained an order requiring the petitioner to file its map or profile or plans, showing the elevation of the road as it passed over his land. He drew and filed a cross-petition, claiming damages to the rest of the farm. A jury trial followed, which took five days. The jury defeated Wylie on his cross-petition and awarded a less sum as damages than had been offered to Wylie before the suit was begun. Wylie's attorney entered a motion for a new trial, which was argued and denied, and the petitioner had judgment in its favor upon payment of the compensation awarded, and Wylie took orders for an appeal, but seems not to have perfected the appeal. The amount awarded Wylie was \$462.50, and the amount awarded the tenant was \$10. The cross-examination of Wylie by the petitioner tended to show that he had offered to pay the railroad company \$1,000 to go on the opposite side of the road. While the petitioner had the word "Electric" in its corporate name, yet it was organized under the general railroad act, and had lawful authority to

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operate its railroad by steam, and did not by its petition profess to confine itself to an electric road. Wylie's attorney had not only to perform the services above stated, but he had to prepare for the trial and to ascertain not only the law governing such a case but had to see and interview the witnesses by whom could be shown the value of the land taken, and also the effect of the taking upon the value of the rest of the farm, and the proof showed that he made a visit to the premises in preparation for the trial.

BUTTERS & CLARK, for appellant.

H. M. KELLY, for appellees.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

### Abstract of the Decision.

1. ATTORNEY AND CLIENT, § 123\*—*when court power to determine fees.* The allowance of attorney's fees rests on a basis different from any other allowance by a court, and while evidence is necessary in such case to show the ordinary and usual charges in similar cases where such fees are the subject of contract, yet the court is well qualified to form an opinion on this subject and will exercise an independent judgment thereon.

2. EMINENT DOMAIN, § 224\*—*how attorney's fees computed.* In a proceeding by a railroad company to condemn a right of way across land of defendant, where the reasonableness of attorney's fees allowed defendant was in question, which fees in part were for services rendered in an unsuccessful attempt to defeat the condemnation proceeding, the court, in determining such reasonableness, cannot treat the proceeding in which the services were rendered as merely one to recover the value of the land damaged, where it appears that the taking sought to be made was of land lying along the entire side of a farm adjoining a highway, and that condemnor, though ostensibly condemning for the purposes of an electric railroad, had also by statute the power to operate by steam at its pleasure, so that defendant might in the future have a steam railroad between his farm and the highway, which was a serious matter.

3. EMINENT DOMAIN, § 224\*—*what is effect of amount of recovery in determining attorney fees.* The fact that the recovery obtained by

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the services of an attorney in prosecuting an action is less than double what is awarded as attorney's fees in a petition for condemnation of land is not conclusive of the reasonableness of such award, since there are many cases where the whole amount of the recovery would not be a fair compensation for the services rendered.

4. ATTORNEY AND CLIENT, § 123\*—*how reasonable value of legal services should be determined.* The determination of the reasonable value of legal services depends upon a consideration both of the nature and result of the controversy in which such services were rendered, the skill and labor required, the responsibility imposed and the standing and character of the attorney rendering such services.

5. EMINENT DOMAIN, § 224\*—*when amount awarded as attorney's fees not excessive.* In a petition seeking to condemn a right of way over defendant's land where defendant was awarded attorney's fees, an award of \$250 for such fees *held* not excessive under the evidence, it appearing that such services were performed by an attorney competent to protect the interests of his client.

6. TRIAL, § 69\*—*when burden of showing number of witnesses unreasonable upon party objecting.* Where objection is made to the number of witnesses called by a party in the trial of an action, the party making the objection has the burden of showing that the number of such witnesses was unnecessary and unreasonable.

7. TRIAL, § 69\*—*when court power to limit number of witnesses.* Rule laid down in *Geohegan v. Union El. R. Co.*, 266 Ill. 482, as to the power of the court to limit the number of witnesses who may testify on a given subject, followed.

8. APPEAL AND ERROR, § 1813\*—*when presumed court would have made order as to limitation of number of witnesses.* On appeal, where it is objected that the number of witnesses called by a party at the trial was unnecessary and unreasonable, the Appellate Court will presume that if a motion had been seasonably made to limit the number of witnesses the trial court would have made a proper order on that motion.

9. APPEAL AND ERROR, § 1813\*—*when presumed number of witnesses not unreasonable.* Where on appeal it is objected that the number of witnesses who testified for a party at the trial of a cause was unnecessary and unreasonable, the Appellate Court will presume in support of the trial court that the number of such witnesses was not unreasonable where the record does not show the subjects on which any witness testified on either side of the case.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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**Sarah E. Smith, Administratrix, Appellee, v. Kewanee  
Light & Power Company, Appellant.**

**Gen. No. 5,966.**

1. **TRIAL, § 187\***—*when motion to direct verdict waived.* A motion made by defendant at the close of plaintiff's evidence in chief to direct a verdict is waived by his subsequently introducing evidence.

2. **PLEADING, § 421\***—*when variance waived.* A motion by defendant at the close of plaintiff's evidence in chief raising questions of variance is waived by defendant introducing evidence thereafter without further suggesting variance.

3. **TRIAL, § 217\***—*what effect of motion to direct verdict after close of all evidence.* A motion to direct a verdict made by defendant after the close of all the evidence raises the question whether there was any evidence legally tending to sustain the verdict.

4. **TRIAL, § 195\***—*when motion to direct verdict properly denied.* If there is evidence introduced which fairly tends to make a case for plaintiff, defendant's motion to direct a verdict made at the close of plaintiff's evidence in chief is properly denied without regard to the court's opinion as to where the preponderance of the evidence is.

5. **TRIAL, § 861\***—*when motion to direct verdict at close of evidence proper.* If there is material variance between all the proof and each count of the declaration, such variance may be presented under a motion to direct a verdict at the close of all the evidence.

6. **PLEADING, § 423\***—*when variance not material.* A variance which consists in the simple mistake of using the word "west" instead of "east" in two counts of the declaration in stating in which direction defendant's wires ran and which was not suggested in the trial court is not material.

7. **PLEADING, § 431\***—*when variance question for jury.* Where there is evidence tending to sustain the charges in the declaration, the court cannot hold that there is a variance based on the evidence of one witness alone, but the question is one for the jury.

8. **APPEAL AND ERROR, § 1411\***—*when finding on conflicting evidence not ground for reversal.* Finding of the jury on conflicting evidence will not be disturbed on appeal where there is sufficient evidence to warrant such finding.

9. **APPEAL AND ERROR, § 1466\***—*when ruling upon admission of testimony not ground for reversal.* Evidence in an action to recover for the death of a person killed by coming in contact with electricity from defendant's wire, examined and held that the ruling of the court upon its admission did not constitute reversible error.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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10. APPEAL AND ERROR, § 1533\*—*when instruction not ground for reversal.* In an action to recover for the death of plaintiff's intestate by coming in contact with an electric wire, an instruction as to the duty of plaintiff proving "her case" and referring to "the evidence bearing on the plaintiff's case" is not objectionable for failing to tell the jury what plaintiff's case is.

11. APPEAL AND ERROR, § 1533\*—*when instruction not ground for reversal.* Error in giving an instruction referring to plaintiff's "case" is not ground for reversal where like language was contained in an instruction given at the request of defendant.

12. APPEAL AND ERROR, § 1523\*—*when instruction not ground for reversal.* In an action to recover for the death of plaintiff's intestate by coming in contact with an electric wire, instructions examined and held not ground for reversal.

13. INSTRUCTIONS, § 131\*—*when refusal to give proper.* Instructions which ignore an element of the case are properly refused.

14. INSTRUCTIONS, § 151\*—*when refusal to give instruction on matters already covered proper.* Refusal to give instruction on questions which are sufficiently covered by other instructions is not ground for reversal.

15. INSTRUCTIONS, § 18\*—*when refusal of misleading instructions proper.* Refusal to give an instruction is not improper where the requested instruction is calculated to mislead the jury.

16. INSTRUCTIONS, § 71\*—*when refusal of instruction incorrectly stating law proper.* In an action to recover for the death of plaintiff's intestate caused by coming in contact with an electric wire, an instruction which placed upon the deceased a higher degree of care than the law imposed upon him, and ignored the duty of defendant owed to one in his position and performing his duty on the wire upon which, at the particular place, deceased had never been before, is properly refused.

17. INSTRUCTIONS, § 164\*—*when second reading of instruction not ground for reversal.* The action of the court in having an instruction brought back to the court room at the request of plaintiff and in the presence of defendant's counsel, and in changing a word therein and reading the instruction again to the jury, is not ground for reversal.

Appeal from the City Court of Kewanee county; the Hon. H. STERLING POMEROY, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed October 20, 1915. *Certiorari* denied by Supreme Court (making opinion final).

ROBERT C. MORSE and STURTZ & EWAN, for appellant.

THOMAS J. WELCH and JAMES H. ANDREWS, for appellee.\*

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Raymond E. Smith, a lineman for the Home Telephone Company of Kewanee, was killed by coming in contact with a high potential current of electricity from a wire of the Kewanee Light & Power Company. His administratrix brought this suit against said company to recover for the loss to the next of kin by his death. A judgment for plaintiff was reversed by us in *Smith v. Kewanee Light & Power Co.*, 175 Ill. App. 354, to which we refer for a general statement of the facts. Upon another trial plaintiff had a verdict and judgment for \$7,750, from which defendant below appeals. We refused to consider certain errors assigned because they were not duly presented by the record. Thereafter appellant caused the record to be amended in those particulars, and we granted a rehearing that they might be considered.

The main contentions of appellant are that the preponderance of the evidence does not support the verdict and that there are material variances between the proof and each count of the declaration. At the close of appellee's evidence in chief defendant made motions raising questions of variance, and made a motion to direct a verdict. These were denied and appellant thereupon introduced evidence. The motion made then to direct a verdict was waived by the appellant by the subsequent introduction of evidence. *Reavely v. Harris*, 239 Ill. 526. At the close of all the evidence appellant again moved to direct a verdict for appellant but did not state the grounds for the motion and did not raise any question of variance between the evidence and the declaration. We are of the opinion that the questions of variance raised at the close of appellee's case were also waived by the introduction by appellant of further proof, for the appellee then became entitled to the benefit of all evidence thereafter



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introduced by appellant and by appellee in rebuttal, and after that additional proof had been introduced appellant did not again suggest a variance between the proof and the declaration. The motion to direct a verdict, made by appellant at the close of all the evidence, raised the legal question whether there was any evidence legally tending to sustain the verdict. *Pate v. Gus Blair-Big Muddy Coal Co.*, 252 Ill. 198. If there was evidence introduced which fairly tended to make a case for appellee, then the motion to direct a verdict was properly denied, regardless of what the opinion of the court might be as to where the preponderance of the evidence was. *Libby, McNeil & Libby v. Cook*, 222 Ill. 206; *Wilkinson v. Aetna Life Ins. Co.*, 240 Ill. 205; *Adams v. Cleveland, C., C. & St. L. Ry. Co.*, 243 Ill. 191. If there were material variances between all the proof and each count of the declaration, then there would be an entire absence of proof material to sustain the verdict, and such variances could be presented under a motion to direct a verdict at the close of all the evidence, because there would be no proof fairly tending to make appellee's case. *Chicago Union Traction Co. v. Brethauer*, 223 Ill. 521. We shall therefore consider the supposed variances.

The lines of the telephone company ran north and south along the east side of Tremont street across Fifth street and other streets. Certain high potential wires of appellant came from the east to a certain cross-arm on a pole of appellant on Tremont street at Fifth street, and certain high potential wires of appellant came from the south to another cross-arm on the same pole, directly beneath the one first mentioned, and each of these wires were there cut off, and each wire from the south was tied to a wire from the east on the cross-arm above it, thus forming a continuous line. Two of the four counts of the declaration charged that these high potential wires came from the south and at Fifth street turned to the west,



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instead of saying, as the fact was, that they turned to the east. It is claimed that this is a fatal variance. It is obvious that it was a simple mistake in using the word "west" instead of "east" in said two counts of the declaration. Our attention is not called to any place in the record where this variance was suggested in the court below, where an amendment could have been made. Appellant knew the location and direction of its own wires and was not misled. Much more serious variances were disregarded in *City of Joliet v. Johnson*, 71 Ill. App. 423, and 177 Ill. 178. The material thing in that respect was the charge that the telephone wire upon which deceased was at work was directly over appellant's high potential wires on said pole at the time he was killed, and it made no difference as to appellant's liability for his death whether it then turned east or west. This variance was not material, and it was not presented in the trial court.

To understand the other alleged variances it is necessary further to describe the situation. The telephone company had a messenger wire extending north and south on the east side of Tremont street and underneath it a cable, which cable when first put up was only temporarily attached to the messenger wire. On the morning in question deceased was traveling along said messenger wire, seated underneath that wire in a saddle, which consisted of a wide strap with a hook at each end, each fastened over the messenger wire. Deceased seated himself in this loop and pulled himself along, from the south to the north as he desired, and as he went along he permanently fastened the cable to the messenger wire behind him, by the aid of appliances which he carried. It is the claim of appellee in her declaration that at the point where this messenger wire came to the vicinity of appellant's pole at the corner of Tremont and Fifth streets, the messenger wire was directly above these high potential wires and that the weight of deceased, about 145

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pounds, and of his saddle and of the appliances which he carried, caused the messenger wire to sag so that when he reached this cross-arm of appellant it became reasonably necessary for him to get upon said cross-arm in getting over and beyond this obstacle, and that he thereby came in contact with these high potential wires, insufficiently insulated, and was killed by the electric current thereon. When this telephone messenger wire was installed there were underneath it three high potential wires in the same situation as those now involved, but they were not the same wires and were only used to carry a high potential current in the nighttime for certain arc lights. The work of a lineman like deceased, traveling along this messenger wire as was frequently done, was not rendered dangerous in the daytime by the presence of those three wires underneath it, because they were used only in the nighttime. After the telephone messenger wire had been erected, appellant removed those three arc light wires and put in their place the present wires to carry a high potential current in the daytime to supply power to a certain factory. This created a dangerous condition for a lineman, if he should come in contact with said wires of appellant when working in the daytime. Deceased had never been along this messenger wire or over this cross-arm until this morning. These wires of appellant were in the street under a certain ordinance of the city, section 3 of which was as follows:

“The plant and appliances for furnishing such electric lights or motive power, shall be so constructed as not to constitute a nuisance or unreasonable annoyance to the inhabitants of this city; or to interfere with the free use of the public streets or alleys of this city; and the whole system and appliances or apparatus thereof shall be so constructed and be of such kind and character as to be safe as can be made by the best known method of construction, and that all poles and

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cross-arms shall be so set and painted as to present a neat and workmanlike appearance.”

Probably in attempted compliance with this provision, appellant had insulation on these wires. Each of the three wires from the east were wound around a glass insulator on top of a peg on the cross-arm, and the wires were then cut off, leaving the ends exposed, and the same was true of the wires from the south, tied to the cross-arm next underneath the top cross-arm, and we infer from the evidence that the connecting wires between these two arms were not insulated. It is the claim of appellee in her declaration that this insulation was insufficient to protect a human being who came in contact with it, and that deceased, in the proper discharge of his duty, got upon one of these cross-arms in an effort to get over and beyond these high potential wires, because the sag caused by his weight on the messenger wire brought him so far down that it was necessary for him to get upon the cross-arm in order to get over. Appellant claims that the proof is that this messenger wire was entirely west of the west end of said cross-arm, so that deceased had no occasion to be upon it, and that appellant's wires were properly and sufficiently insulated, and that deceased, for some purpose of his own, got upon the cross-arm and went down appellant's pole to the ground, and came up again, and was upon the cross-arm for the purpose of getting back into his saddle, when he received the charge of electricity which killed him; and that his business as a lineman did not call him there; and that he was either a trespasser or a mere licensee, to whom appellant owed no duty; and that it therefore made no difference whether it had sufficient or any insulation, as it owed him no duty to protect him. The claim of appellant that deceased went down the pole and back again rests upon the evidence of one Doy that he saw deceased on the cross-arm just before he fell, which evidently was just after

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he had received the fatal charge of electricity. He testified in chief that some ten minutes before that he was looking out from a blacksmith shop some distance away and saw deceased about four feet from the ground going up this pole. He was afterwards recalled and testified that deceased was an entire stranger to him and he did not know that it was deceased whom he saw going up the pole, nor did he notice how the man was dressed whom he saw going up the pole. It is evident that it was a mere inference on his part that the man whom he saw on the pole near the ground was the man whom he afterwards saw in the act of falling from the cross-arm. We are not prepared to hold that if deceased did descend to the ground, and came back again, he was beyond the protection of this ordinance. But the jury were not required to believe that it was deceased whom Doy saw four feet above the ground. There were circumstances in evidence from which the jury might conclude that deceased was engaged in getting over the obstacle of this cross-arm and had unhooked one end of his saddle to enable him to get upon and over the cross-arm. There was a burnt place on the insulation of one of these wires indicating the probable place where deceased came in contact therewith. Because of that evidence tending to sustain the charges in the declaration, the court could not hold that there was a variance based on the evidence of Doy alone, but was required to leave that question to the jury, as was done in several instructions given at the request of appellant. There was evidence fairly tending to show that this messenger wire was directly above these high potential wires, and passed directly over this west cross-arm, and that the insulation on appellant's wires was for protection against the weather, and was not sufficient to protect a person who, in the discharge of his duty, had occasion to be where he might come in contact with it. The evidence justified the conclusion that this insulation was

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only intended to protect the wires from the weather, and was not at all fitted to protect a person who might have occasion to take hold of the wire, and that it was not such insulation as the ordinance called for. Appellant had evidence that this messenger wire was entirely west of the cross-arm, and not over it, and not above its wires, and that its insulation was sufficient. What appellant really means by its argument on this subject is that its evidence on those subjects was much more credible than that produced by appellee, and that we should decide that the great preponderance of the evidence favors appellant on these questions, and that because thereof the judgment should be reversed. We are satisfied that there is evidence fairly tending to make a case for plaintiff under at least three counts of the declaration. Two juries found the issues for appellee, and the trial judge has twice approved such a verdict, and while the evidence is conflicting we do not find its condition such as to warrant us in again disturbing that conclusion.

It is contended that the court erred in various rulings upon the admission of testimony. We have considered these questions and think those errors are not well assigned. Witnesses who had had considerable experience in work of this kind were permitted to give their opinions on various questions, both as to the sufficiency of the insulation for the protection of human beings and as to the distance which a messenger wire like this would sag nearly half way between the telephone poles, with such a weight as was placed upon it by deceased and his appliances. We conclude that they were, at this trial, shown to be sufficiently qualified to permit them to answer these questions. We do not hold that all the rulings on this subject were absolutely correct, but that they were sufficiently correct and that no reversible error is contained in them.

Complaint is made of instructions given at the request of appellee and of the refusal of instructions

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requested by appellant. Instruction No. 4 spoke of the duty of appellee to prove "her case" and of "the evidence bearing on the plaintiff's case," without telling the jury what the plaintiff's case was. The same criticisms here presented were discussed in *Chicago City Ry. Co. v. Nelson*, 215 Ill. 436, where a like instruction was sustained. Like instructions were approved in *Donley v. Dougherty*, 174 Ill. 582; *Taylor v. Felsing*, 164 Ill. 331; *Chicago Consolidated Traction Co. v. Schritter*, 222 Ill. 364; *Pierson v. Lyon & Healy*, 243 Ill. 370; and by this court in *Devine v. Ryan*, 115 Ill. App. 498, and *Hammond v. Woodruff & Edwards Co.*, 168 Ill. App. 368. Moreover, instruction No. 1, given at the request of appellant, contains a like reference to plaintiff's case and, if there was any error in such a reference, appellant is thereby estopped to complain of it. Instruction No. 3 for plaintiff was approved in substance in *Commonwealth Elec. Co. v. Rose*, 214 Ill. 545. Instruction No. 7 was on the subject of the measure of damages if the jury found for appellee. It is objected that it is not limited to the negligence charged in the declaration and that it does not confine the jury to the evidence. The instruction properly made no reference to the subject of negligence. It was applicable only in case the jury had already found for the plaintiff and had found defendant negligent. It did confine the jury to the evidence. The evidence is twice referred to in the instruction. Complaint is made of instruction No. 18 given for appellee. It is discussed at length and approved in *Baltimore & O. S. W. Ry. Co. v. Then*, 159 Ill. 535, and is approved in *U. S. Brewing Co. v. Stoltenberg*, 211 Ill. 531, and in these two cases many other cases are cited in support thereof. Defendant's instruction No. 2 refused, ignored the question of safety, and ignored the duty imposed upon appellant by the ordinance, and ignored the change which appellant had made in the use of its high potential wires in the daytime after the

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telephone wires had been installed. Appellant's refused instruction No. 5 ignored its duty under the ordinance, and did not require the best known method of construction, which the ordinance required of it. Moreover, instructions Nos. 9, 15 and 16, given at the request of appellant, fully covered the point. Appellant's refused instructions Nos. 6, 9 and 10 were sufficiently covered by given instructions. Appellant's refused instruction No. 7 was calculated to mislead the jury. Appellant's refused instruction No. 8 was as to death caused by mere accident, but everything possible by which this death could be attributed to mere accident so as to excuse appellant was covered by instructions given at appellant's request. Appellant's refused instruction No. 10 was covered by its given instructions Nos. 13 and 14, and its refused instruction No. 11 was covered by its given instruction No. 13. Appellant's refused instruction Nos. 7, 8, 10 and 11 were not in every respect correct. They placed upon deceased a higher degree of care than the law imposed upon him, and ignored the duty appellant owed to one in his position and performing his duty on the telephone wires, upon which particular wires at that particular place the deceased had never been before that day.

Appellee's instruction No. 18, as given to the jury a few minutes before the dinner hour, contained the word "died." It was an exact reproduction of an instruction which had been approved by the Supreme Court in *U. S. Brewing Co. v. Stoltenberg*, *supra*, except that the latter contained the word "killed" instead of the word "died." When the jury returned to the jury room after dinner, the court, at the request of appellee's counsel, had the instruction brought back to the court room in the presence of appellant's counsel, and changed the word "died" to "killed" and again read said instruction to the jury, over the objection of appellant. It is not contended that the instruction is



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erroneous, and we approve the court's proceeding. Probably the amendment was not necessary, but it was a proper precaution, properly exercised, and we fail to see that appellant could be harmed by a second reading of a correct instruction. We find no reversible error in the record and the judgment is affirmed.

*Affirmed.*

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**Daniel J. Doering, Appellee, v. Peoria & Pekin Union  
Railway Company, Appellant.**

**Gen. No. 6,033.**

1. **MASTER AND SERVANT, § 658\***—*when rule and custom to be considered in determining the question of negligence.* In an action by an employee to recover for injuries claimed to have been received through the negligence of the master, the rule and custom prevailing in the performance of the master's business will be considered in determining whether the employee was guilty of negligence.

2. **MASTER AND SERVANT, § 751\***—*when contributory negligence question for jury.* In an action by an employee for injuries claimed to have been received through the master's negligence, it is a question for the jury whether in view of an existing rule and custom as to the performance of the master's business, the employee was in the exercise of due care for his own safety.

3. **MASTER AND SERVANT, § 465\***—*when nature of servant's employment to be considered in determining question of contributory negligence.* In an action by one working as a crossing flagman at a railroad crossing against a railroad using such crossing to recover for injuries by being struck by a train operated by such railroad company at the crossing, in determining whether or not plaintiff was guilty of contributory negligence, regard must be had to the fact of his employment at the crossing by defendant to ascertain the approach to the crossing of trains and engines and to warn persons of their approach.

4. **MASTER AND SERVANT, § 699\***—*when evidence shows contributory negligence.* In an action by the crossing flagman to recover for injuries through being struck by a train at the crossing where the evidence shows that the train was in sight for four blocks, the

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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weather clear and the time of the accident midday, it is sufficient to show that plaintiff did not properly look in the direction from which the train was approaching.

5. MASTER AND SERVANT, § 699\*—*when servant guilty of contributory negligence.* Where the evidence shows, in an action by a crossing flagman to recover for injuries through being struck by a train at the crossing, that at the time of the accident he was neglecting the duty which he was stationed there to perform and while thus neglecting his duty received the alleged injury, which he would not have received if he had performed his duty, the evidence is sufficient to warrant a finding of his contributory negligence.

Appeal from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the October term, 1914. Reversed with finding of facts. Opinion filed October 20, 1915.

STEVENS, MILLER & ELLIOTT, for appellant.

EVANS & EVANS, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Appellee, a crossing flagman on Fulton street in the City of Peoria, was struck by the head end of a passenger car of appellant being driven upon said crossing and was seriously injured, and brought this suit to recover damages therefor, and filed a declaration of three original and two additional counts, which were sufficient to state the case which appellee sought to prove. Appellant filed the general issue and there was a jury trial, and appellee had a verdict for \$4,000. A motion by appellant for a new trial was denied, judgment was entered on the verdict and the defendant below appealed. We affirmed the judgment, and we granted a rehearing to enable us to re-examine the evidence, and we have carefully examined it in the record, which is fuller than the abstract.

At the place in question four railroad tracks run northeasterly and southwesterly in the City of Peoria below a bluff and near the river. Fulton street crosses

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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them at right angles. The track nearest the river is the Chicago-bound track of the Chicago, Rock Island & Pacific Railway Company. The track next northwest of that is the Rock Island track for trains coming from Chicago. These are called the outbound and inbound tracks. The third track to the northwest is the main track of the Peoria & Pekin Union Railway Company. The track nearest the bluff is the freight track of the Peoria & Pekin Union Railway Company. On the river side of the tracks, just southwest of Fulton street, is the passenger station of the Rock Island road. About four blocks southwest is the union station which is used by the Peoria & Pekin Union Railway Company. The latter road operated passenger trains from Fulton street to Pekin, a number of miles away. These trains were made up at the union depot, four blocks southwest, with the engine ahead of the car or cars when making the trip to Pekin, and then were backed up to Fulton street. For the protection of the train and the public, there was upon the northeast end of the car, which was ahead as the train backed up, an air brake and an air whistle intended to be operated by the brakeman of the train, whose duty it was to stand on the advancing end of said train as it backed, and blow the whistle to warn people from coming upon the track, and to apply the air brake and stop the train whenever danger required it and when the place was reached where it was to stop. That railway had no depot at Fulton street, but on the northwest side of its main track and southwest side of Fulton street it had a platform running southwest from Fulton street twenty feet or more. The train usually consisted of one car with a ladies' compartment in the northeast end, a baggage room in the middle, and a smoking compartment in the southwest end. A passenger train was due to leave the Rock Island station just southwest of Fulton street at one o'clock p. m., each day, and at the same time this train for Pekin was due to leave

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from this platform southwest of Fulton street. On Sunday, April 14, 1912, the Rock Island train left on time, and almost immediately thereafter the Pekin train, backing up, reached Fulton street. It had two cars on that day. Appellee was crossing flagman for all the tracks on Fulton street. He had no duty to stop or signal trains. His sole duty was to watch for coming trains on each track in all directions and to warn foot passengers and drivers of teams and vehicles using said street and to protect them from coming trains. He had a rest shanty southeast of all the tracks. He was on the pay roll of the Rock Island road, and was paid by that company, but appellant paid the Rock Island company one-half of his salary each month. He was, in reality the servant of both companies. So far, there is no substantial conflict in the testimony.

In many other respects the evidence is conflicting. As a single example thereof, some witnesses testified that at the time of the accident the train backed substantially all the way across Fulton street, and then pulled forward until the rear of the car was at the southwest line of Fulton street. Other witnesses testified that the car was backed to about the middle of Fulton street, and was then pulled forward. The engineer is very positive that the northeast end of the train only reached the line of Fulton street. The evidence warranted the jury in finding that the flagman was struck when he was about the middle of Fulton street, and that the train went some further than that. Appellee and some other witnesses heard no bell ringing, but at least three witnesses swore that there was an automatic bell upon the engine at the rear of this train as it was pushed northeast, and that the automatic bell was started to ringing before the train started from the union station, and did not stop until after this accident. Appellee flagged the crossing when the Rock Island train went northeast. He

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seems to have gone over to the northwest side of all the tracks and then started back towards his shanty and, at the time he was struck, was facing to the northeast, and perhaps standing still. He was able to tell about how far the Rock Island train had gone up the track. The proof also shows that a Rock Island train from Chicago had been due some twelve or fourteen minutes and had not arrived. It was, in fact, twenty-five minutes late, but there is nothing to show that appellee knew that fact. It is quite possible he was looking northeasterly watching for that past due train. His left hip was struck by the corner of the step on the river side of the advancing car. He was whirled around facing the car a little back of the steps, and threw his hands up against the car to avoid being thrown under it, and then fell down.

The proof by appellee and his witnesses tended to show that as that train approached and reached Fulton street there was no one on the front end of that advancing car and no one operating the air whistle or air brake, and that they were not operated. The brakeman whose duty it was to operate it had left the employ of appellant some five months before the trial, and appellant did not produce him nor show its inability to do so. The conductor testified that he stood in the door of the car, that the brakeman was at his post sounding the air whistle and ready to apply the air brake, and that he saw appellee on the crossing far enough away from the line of the approaching car so as to be in a place of safety and then turned his attention to the passengers standing in the street on the other side of the track so as to see that they did not run any risk of being hurt. Appellant drew out of the appellee on cross-examination, and without objection, that the conductor came to see him the next day after the accident, and told him that "we" (evidently meaning the conductor and brakeman) "were in the end of the car talking." Appellee's son testified in

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rebuttal, by way of impeachment of the conductor, that on the next day after the accident the conductor called upon him at his place of business, and in answer to questions told him that at the time of the accident he, the conductor, was in the passenger car counting his tickets and change, and that he did not know where the brakeman was. The conductor admitted that he had these interviews, but denied both of these statements. No one but the conductor testified that the brakeman was at his post of duty, as the car was pushed backward. For all that we know, the jury may have believed appellee and his son and may have disbelieved the denial of the conductor, and may have believed that on the day after the accident the conductor excused it by saying to the son that he did not know where the brakeman was at the time of the accident, as he, the conductor, was in the car counting his tickets and change; and may have believed that he excused himself to the father on the ground that both he and the brakeman were inside the coach talking. They therefore may have believed, from this impeachment of the conductor and from the unexplained absence of the brakeman from the trial, that, in fact, the brakeman was not at his post of duty, and was not sounding the air whistle nor in readiness to apply the air brake.

It is established by evidence introduced by both sides that the rule and requirement of appellant was that the train should be stopped at the southwest side of Fulton street, but that in actual operation the trainmen did often run the car to the middle or the upper side of Fulton street, and that appellee knew this. There is nothing to show that when the car had been so run on to Fulton street it had not been protected by a brakeman with an air brake and an air whistle, as the custom required.

The question what the rule was and what the custom was at that place bears both upon the allegation that

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appellant was guilty of negligence in the manner in which this car was pushed across Fulton street, and also on the question whether appellant was in the exercise of due care for his own safety. We do not doubt that the jury were warranted in finding that appellant was guilty of the negligence charged. It has been frequently recognized by the courts of this State that the rule and custom prevailing is to be considered in determining whether an employee is negligent. *Pennsylvania Co. v. Stoelke*, 104 Ill. 201; *North Chicago St. Ry. Co. v. Irwin*, 202 Ill. 345; *Chicago City Ry. Co. v. Lowitz*, 218 Ill. 24; *Franey v. Union Stock Yard & Transit Co.*, 235 Ill. 522; *Sturm v. Consolidated Coal Co.*, 248 Ill. 20, 28, 29. These cases also show that it is a question of fact for the jury whether in view of the existing rule and custom, the injured servant was in the exercise of due care for his own safety.

But in deciding whether appellee was in the exercise of due care for his own safety or was guilty of negligence which materially contributed to his injury, it is further to be considered that he was placed upon that crossing by the railroad companies as a precaution added to the statutory signals of bell and whistle and added to the air whistle and air brakes on the end of the advancing car. He owed his employers the duty to ascertain the approach to that crossing of all trains and engines, and to give timely warning and signals to stop to all foot passengers and to the drivers of all vehicles that a train or an engine was approaching. At and just before appellee was struck by the train there were persons at that street intending to become passengers on that train. Appellee testified that they were near a saloon beyond the fourth track. The conductor testified that they were on the street just beyond the third track. There were also two pedestrians coming up Fulton street from the southeast and already on the Rock Island tracks. All

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these people were entitled to warning from appellee that this train was approaching. Appellant was entitled to have appellee ascertain the approach of this train and give warning to the people on the street. If a traveler on the street had been hit by this car, it would have been proof of negligence by the railway company that this flagman did not see this approaching car and did not warn such traveler by the timely display of his flag and otherwise. *Chicago, St. L. & P. R. Co. v. Hutchinson*, 120 Ill. 587; *Chicago & A. R. Co. v. Adler*, 129 Ill. 335; *Chicago, R. I. & P. Ry. Co. v. Clough*, 134 Ill. 586; *Chicago & A. R. Co. v. Blaul*, 175 Ill. 183; *Carlin v. Grand Trunk Ry. Co.*, 243 Ill. 64. This is not the case of a servant of a railway company upon and about the tracks to perform some other duty and with a right to rely upon the railway company to give all statutory and customary signals while he is performing that other duty. This was one of the servants of the railway company whose duty it was to ascertain the approach of the train and give signals therefor. He entirely failed to perform that duty. The train was in sight for four blocks. He could not fail to see it if he looked, for the weather was clear and the time was midday. Under these circumstances the fact that he did not see it proves conclusively that he did not properly look in that direction. It has been held that under such circumstances a person upon whom such a duty rested cannot recover for an injury to himself which he would not have received if he had performed his duty. *Ruane v. Lake Shore & M. S. Ry. Co.*, 64 Ill. App. 359; *Loettker v. Chicago City Ry. Co.*, 150 Ill. App. 69; *Shea v. Chicago & O. P. El. R. Co.*, 183 Ill. App. 380. In *Clark v. Boston & A. R. Co.*, 128 Mass. 1, a flagman was injured under circumstances similar to those in this case and sued his employer for damages and the trial judge directed a verdict for the defendant, and that ruling was sustained. It was there said that the plaintiff undertook to perform a



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duty, and neglected his duty, and while thus neglecting his duty he received the alleged injury; that he simply failed to see what it was his duty to see and failed to give the notice he was there to give, and that he had no cause of action. In the case at bar it is our opinion that no jury could reasonably find otherwise than that appellee was not in the exercise of due care for his own safety, but was negligent and failed to perform the duty he owed appellant, and would not have been injured if he had performed that duty, and that his negligence materially contributed to the injury for which this suit is brought. The judgment is therefore reversed.

*Reversed with finding of facts.*

MR. JUSTICE NIEHAUS took no part.

Finding of facts to be incorporated in the judgment.

We find from the evidence that appellee was not in the exercise of due care for his own safety, and failed to perform the duty he owed to appellant; that he would not have been injured if he had performed that duty; that he was negligent and that his negligence materially contributed to the injury for which this suit was brought, and that he therefore has no cause of action against appellant for said injuries.

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**The People of the State of Illinois, Defendant in Error,  
v. Michael A. Herbert, Plaintiff in Error.**

**Gen. No. 6,067. (Not to be reported in full.)**

Error to the County Court of Boone county; the Hon. WILLIAM C. DEWOLF, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.



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### Statement of the Case.

Information by the People of the State of Illinois against Michael A. Herbert and William Peck, containing thirteen counts, wherein they were charged with selling intoxicating liquors in the Town of Belvidere when the same was anti-saloon territory. The defendants pleaded not guilty and were tried by a jury. During the trial the information was quashed as to the defendant Peck. Defendant Herbert was found guilty as charged in counts 1, 4 and 8 of the information. He moved for a new trial and in arrest of judgment and those motions were denied. He was fined \$100 under each of said three counts and sentenced to imprisonment in the county jail for twenty days under the first count, for ten days under the fourth count, and for ten days under the eighth count, which the judgment recites makes "a total of forty consecutive days," and was committed to the county jail until the fine and costs were paid at the rate of \$1.50 per day for each day's work in the workhouse of the county, or until otherwise legally discharged, and it was ordered that defendant so work accordingly and that his commitment and work for nonpayment of fine and costs begin at the expiration of said forty days' jail sentence. To reverse this judgment, defendant Herbert prosecutes this writ of error.

There was proof that defendant Herbert had secured two Federal licenses for retailing liquor at two different places.

Defendant contended that as the only proof of his guilt was the evidence of two detectives which was contradicted by his evidence and that of his clerk, the evidence was evenly balanced and a conviction should not stand.

For the People there was evidence that defendant had been a saloonkeeper before the territory became dry and that thereafter he did business over the same

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bar and with the same appliances. While defendant claimed to be selling only soft drinks, his testimony showed that he had bought a very large quantity of beer which he kept in the basement of his place of business. He testified that beer had been prescribed for a disease from which he suffered and that he used this only at home and for himself, his wife and her sister. He also gave an estimate of the number of bottles bought and the number so used and the number left on hand at the time of his indictment, which estimate left more than 1,000 bottles unaccounted for.

WILLIAM L. PIERCE and DOUGLAS PATTISON, for plaintiff in error.

PATRICK H. O'DONNELL and DAVID R. JOSLYN, for defendant in error.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

### Abstract of the Decision.

1. CRIMINAL LAW, § 449\*—*when question as to method of procuring jury not preserved for review.* Where the bill of exceptions fails to show how the jury were drawn or summoned or that there was any error in that respect, merely showing that one or more jurymen were called into the jury box from the bystanders, and the points in writing filed by defendant with his motion for a new trial and with his motion in arrest of judgment do not include anything on the subject, the question of the method of procuring a jury is not preserved for review.

2. CRIMINAL LAW, § 541\*—*when exclusion of evidence not ground for reversal.* On an information for selling liquor in anti-saloon territory possible error of the court in refusing to permit defendant to explain why he procured Federal license for retailing liquor in such territory is not ground for reversal where he was afterwards permitted to make full explanation.

3. INTOXICATING LIQUORS, § 151\*—*when verdict in prosecution for illegal sale not against weight of evidence.* On an information for selling liquor in anti-saloon territory, the verdict is not against the weight of the evidence merely because the sole proof of defendant's

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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guilt was the evidence of two detectives which was wholly contradicted by the evidence of defendant and his clerk.

4. INTOXICATING LIQUORS, § 151\*—*when evidence sufficient to support finding of sale in anti-saloon territory.* Evidence on an information for selling intoxicating liquors in anti-saloon territory examined and held to support a verdict of guilty.

5. INTOXICATING LIQUORS, § 158\*—*when instruction as to effect of issuance of Federal receipt proper.* On an information for selling intoxicating liquors in anti-saloon territory, an instruction that the issuance of an internal revenue special tax stamp or receipt by the United States to any person as a retail dealer in liquors or in malt liquor at any place in anti-saloon territory is prima facie evidence of the sale of intoxicating liquor by such person at such place or at any place of business of such person within anti-saloon territory where such receipt is posted, provided a sale of liquor of any kind is proven beyond a reasonable doubt, regardless of the kind of liquor sold, is not improper for failure to require not only the issuance of such receipt but its posting at his place of business, where the instruction follows the language of the statute and defendant causes the court to give a second instruction for him to the same effect which does not require the posting of such notice.

6. CRIMINAL LAW, § 558\*—*when error in giving or refusing instructions not ground for reversal.* Even though the rulings upon the giving or refusing of instructions are subject to criticism, yet if the jury were sufficiently and fully instructed when all the instructions given are taken into consideration, such ruling is not ground for reversal.

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## **The People of the State of Illinois, Defendant in Error, v. Walter Krause, Plaintiff in Error.**

**Gen. No. 6,070.**

1. CRIMINAL LAW, § 219\*—*when failure of prosecution to furnish names of witnesses harmless.* In an indictment for unlawful selling of liquor on Sunday, the refusal of the State's Attorney to furnish to defendant information as to the place of residence of witnesses indorsed on the indictment is harmless, where defendant's counsel had full opportunity through the presence of such witnesses at other trials in the same court to investigate or interview them before the taking of proofs in defendant's case began.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. CONTINUANCE, § 84\*—*when affidavit for continuance on ground of absence of witness insufficient.* Where application is made for a continuance because of the absence of a material witness who is out of the State and beyond the reach or process of the court, it is necessary that the affidavit show the grounds of a reasonable expectation that the absent witness will return to the State by the next term of the court and that it deny defendant's guilt in positive terms.

3. JURY, § 47\*—*when names of women properly omitted.* The names of women voters in the several towns are properly omitted by the county board in making its lists of jurors.

4. INTOXICATING LIQUORS, § 130\*—*what degree of proof essential in prosecution for unlawful sale.* To convict one on an indictment for selling intoxicating liquor on Sunday, it is not sufficient that the jury find that the defense was fabricated, but before the defendant can be found guilty his guilt must be established beyond a reasonable doubt.

5. INTOXICATING LIQUORS, § 147\*—*when evidence insufficient to show unlawful sale.* On an indictment for selling intoxicating liquor on Sunday, evidence examined and held insufficient to show that defendant was guilty of the offense charged.

Error to the County Court of Lake county; the Hon. DAVID T. SMILEY, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed October 20, 1915.

E. V. ORVIS and JAMES G. WELCH, for plaintiff in error.

R. J. DADY and E. M. RUNYARD, for defendant in error.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Walter and Stephen Krause were jointly indicted by the grand jury of Lake county for unlawfully selling liquor on Sunday. The case was certified to the County Court for process and trial. The indictment was afterwards *nolle prossed* as to Stephen Krause. After certain preliminary matters there was a change of venue from the county judge of Lake county, and another judge took charge of and tried the case.

Defendant was convicted by a jury under the fifth,

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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sixth and seventh counts of the indictment and was fined thereunder, and was ordered imprisoned to work out the fine if it was not paid, and has sued out this writ of error to review that judgment.

There was a motion for a bill of particulars and the State's Attorney filed a bill of particulars, giving the dates he would rely upon. The defendant moved for a more specific bill of particulars and this motion was denied. The affidavit for the bill of particulars stated that the affiants had endeavored to learn as much as possible about T. W. Youngs and W. F. Youngs, the only witnesses whose names were indorsed upon the back of the indictment, and that defendant was informed that they were detectives and would testify against defendant; that in fact said witnesses did not buy any intoxicating liquor of defendant; that defendant did not know where said witnesses resided and had applied to the State's Attorney for their place of residence and the State's Attorney had refused to furnish that to them. We are of opinion that the State's Attorney should have been required to furnish the defendant with the place of residence of said witnesses, so that the defendant might be able to interview said witnesses, or to investigate their character and standing, before the trial. But it appeared during the trial that prior to the trial of this case at least two other cases against saloon keepers for like offenses had been tried in the same court, and that these two witnesses had testified for the People in those cases and that the attorneys for the defendant here knew what they had testified to in those other cases and therefore knew what it was necessary for them to know about said witnesses in order to prepare for this trial. How long those trials occurred before this does not appear, but this trial began on July 3, 1914, and was then adjourned to July 7th, and the impanelment of the jury was not completed until July 7th, so that defendant's counsel had full opportunity to investigate or interview said witnesses before

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the taking of proofs in this case began. Therefore we conclude that defendant was not harmed by the failure to furnish him with the residence of those witnesses.

Defendant moved for a continuance because of the absence from the State of Charles Moore, Charles Murphy and Fred Brown, alleged to be material witnesses for defendant. Among the dates stated in said bill of particulars were April 19, April 26 and May 3, 1914. The affidavit stated that T. W. Youngs and W. F. Youngs would testify for the People that they purchased intoxicating liquor of the defendant on those three dates, which were Sundays, and that they entered the place of business of defendant in North Chicago on those days and bought intoxicating liquor of defendant and his bartender; that Fred Brown would testify that on Sunday, April 19, 1914, he tried to enter the place of business of defendant but the door was locked and no one was in it; that upon starting to go away, he saw T. W. Youngs in the vicinity and knew him to be a detective, and saw him go to the door of defendant's premises and try to get in, but that he was unable to get in; that he thereupon watched T. W. Youngs and W. F. Youngs and followed them from place to place in hopes of finding a place where he, Brown, could get a drink of intoxicating liquor; that he knew that said T. W. Youngs and W. F. Youngs did not enter defendant's premises on that day and did not buy intoxicating liquor from him or his employee; that Charles Murphy will testify that on Sunday, April 26, 1914, he met T. W. Youngs and W. F. Youngs in North Chicago and saw them attempt to enter defendant's place of business and observed them throughout the time they were in North Chicago and that they did not enter defendant's place of business; that Charles Moore will testify that on Sunday, May 3, 1914, he was in North Chicago and saw T. W. Youngs and W. F. Youngs endeavoring to open the door of defendant's saloon but that they failed and left the

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premises, and that he, Moore, then tried the door and was unable to enter the premises; and that on a certain later date named and at a place named, in a conversation between Moore and T. W. Youngs, the latter stated to Moore that he had not been able to enter the premises of defendant on any of the Sundays, and he asked Moore to take him over the next Sunday, so that he could get a drink from defendant and others. This evidence would have been very material on the trial of this case. The affidavit further stated that the testimony of T. W. Youngs and W. F. Youngs is false and that the testimony of Moore, Murphy and Brown is true; that defendant had no other witnesses who would testify as to said facts; that these witnesses were not absent by his procurement or by the procurement of any one connected with the case; that they are at Des Moines, Iowa; that Brown and Moore would return about August 1, 1914, and Murphy about September 1, 1914. This affidavit is defective. In case of an application for a continuance because of the absence of a material witness who is out of the State and beyond the reach of the process of the court, it is necessary to show the grounds of a reasonable expectation that the absent witness will return to the State by the next term of court. *Eubanks v. People*, 41 Ill. 486; *Perteet v. People*, 70 Ill. 171; *Wilhelm v. People*, 72 Ill. 468; *Dacey v. People*, 116 Ill. 555. Defendant did not state in his affidavit that these witnesses told him that they would return by the dates named. If they did not tell this to him but to some other person, then the affidavit of that other person should have been produced. Moreover the affidavit did not deny the guilt of defendant in positive terms. We therefore conclude that it was not error to deny the continuance. Nevertheless, as the delay would only have been for about two months, we think the trial judge, in the exercise of a wise discretion, might well have postponed the trial beyond the dates named.



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Defendant moved to challenge the array, which was denied, and then moved to quash the venire, which was also denied. The grounds of these motions were that the county board, in making its list of jurors in the preceding September, pursuant to section 1 of the Jury Act (J. & A. ¶ 6831), did not take into account the women in the several towns who were voters, and did not make a list of at least one-tenth of the legal voters of each town, when the women are counted as voters. Women are not legal voters on all subjects, but have a limited right to vote. We are of opinion that the names of women who could vote on certain subjects in the respective towns were properly omitted from consideration in making up the list.

Defendant owned a double building facing east in North Chicago. The south half thereof was a single room used as a saloon by defendant and had a bar on the north side of the front part of that room. It had no outside door, except the east or front door. The north half of the building was divided into two rooms. The front room was a grocery run by Stephen Krause. The rear room we may call a storeroom. It had a west outside door, and both the grocery and saloon goods were received through that door into that room. There was a door on the east side of that room into the grocery and a door on its south side into the saloon. Defendant had no bartender, but, if he was absent, his wife tended bar for him, and on a few occasions his brother Stephen came in and assisted. Stephen had a hired man. T. W. Youngs was a detective employed by the county under the direction of the State's Attorney to detect violations of the liquor laws in North Chicago. Walter F. Youngs had never done any detective work, except on these three Sundays. These two men testified for the State that on Sunday, April 19, 1914, they passed west along the south side of this saloon and through a gate to the rear of the building and then turned north and went in at this rear door



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of the storeroom, and in that room found tables and men sitting there playing cards, with bottles standing on the tables before them, which appeared to be bottles of beer; that there was a man in attendance, who was not the defendant and whom they did not know, and they asked him for something to drink and he replied that he did not sell on Sunday, but on being requested again said he could sell them some bottled beer, and that he did bring them some bottles of beer which they paid for and drank. Walter Youngs testified that this liquor was brought from the saloon and that from where he stood in the storeroom he saw the bar. Proof by defendant and a diagram of the building showed that it was impossible for one standing in the storeroom to see the bar, and also that Stephen kept beer in his grocery and sold it on commission; and it may be that what Walter supposed to be the bar was the counter in the grocery and that the man in attendance was Stephen's hired man selling beer from the grocery and from Stephen's stock. They both swear this was at 12:15 p. m. They testified that they went into this same storeroom through the same door about four o'clock p. m. on Sunday, April 26, 1914, and saw men sitting at a table and bottles before them and bought two bottles of whisky and paid therefor, and that defendant personally served them, and that the same thing occurred again on Sunday, May 1, 1914, between eleven and twelve a. m. There is a clear numerical preponderance of evidence that on Sunday, April 19th, defendant and visitors were in his home, right back of this saloon, from ten o'clock in the morning until mid-afternoon or later; that on Sunday, April 26th, defendant left North Chicago in mid-forenoon and was in the City of Chicago at the home of a brother all that afternoon; and that on Sunday, May 3, 1914, he and several friends left North Chicago at 8:30 a. m. or 9 a. m. in an automobile with provisions and fishing tackle and spent the day some distance away at

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the Des Plaines River. The testimony for defendant sustaining these contentions was by witnesses who did not always agree in every detail. On the other hand, it appeared by the cross-examination of the Youngs brothers that Thomas kept a memorandum of events and of these and the other saloons they visited and that they both had talked over this case from this memorandum before they testified; and after the court had improperly sustained cross-questions put by defendant's counsel to Thomas Youngs on this subject, the witness finally admitted that on the trial of a former case against another saloon keeper in North Chicago he had testified that as to the occurrences at the Krause saloon he had no independent recollection thereof, and testified concerning them at that time, not from memory but solely in reliance on notes which he had made. It is entirely clear that if the jury had found the defendant not guilty, that verdict would have been supported by the numerical preponderance of the evidence, and it is a serious question whether this case ought not to be submitted to another jury upon the facts. In this condition of the evidence the Assistant State's Attorney, in his opening argument to the jury after the close of the evidence, told the jury, in substance, that if they believed that the witnesses for the defense were not telling the truth and if they believed the defense was manufactured, then it was their duty as good citizens and as jurors to find the defendant "not guilty" as the record reads or "guilty" as the abstract reads. Objection was made to this statement. That objection was sustained only to the use of the words "it is their duty." Thereafter the same attorney said to the jury: "If you believe that the testimony on the part of this defense is not to be credited, it is your solemn duty to return a verdict of guilty against the defendant on all three counts the State has proven in this case." This was objected to and the court was asked to instruct the jury to disregard that sentence. The

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objection was overruled and the instruction refused. It is not the law that if the defense was fabricated, the defendant should be found guilty. Before the defendant could be found guilty his guilt must be established beyond all reasonable doubt. The jury might have disbelieved the testimony of defendant and his witnesses and also discredited the testimony of the two witnesses for the People, or might not have been satisfied therefrom beyond a reasonable doubt that the defendant was guilty. By overruling the objection the jury would understand that the court approved the proposition that if the evidence of the defendant was untrue, then it was their duty to find the defendant guilty, and also that the court was satisfied that the defendant had been proven guilty on three counts of the indictment. When the state of the evidence and this ruling are considered together, we conclude that the case should be submitted to another jury.

*Reversed and remanded.*

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**The People of the State of Illinois, Defendant in Error,  
v. Hiram Gilmore, Plaintiff in Error.**

**Gen. No. 6,072.**

1. CRIMINAL LAW, § 409\*—*when entry of judgment on some counts does not oust jurisdiction of remainder.* Where, in an indictment containing eleven counts, defendant pleaded guilty to the first three counts and was fined thereunder and paid the fine in open court and thereupon the State's Attorney dismissed all the remaining counts except the eleventh, and thereafter, on the same day, the defendant and the State agreed in writing that the cause should be heard upon a stipulation as to the facts which was that day filed in the cause, such stipulation signed by defendant personally and by the attorneys for both parties containing the following language, "It is hereby stipulated and agreed \* \* \* that said cause shall be and it is hereby submitted \* \* \* upon the following agreed facts, the

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly. same topic and section number.

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eleventh count in the indictment being the only count in the said indictment for trial in this cause," and the cause proceeds to trial and judgment is rendered thereupon without raising the question of the court's jurisdiction to try defendant on such count after entering judgment on the earlier counts, defendant cannot on appeal for the first time question the jurisdiction of the trial court.

2. **APPEAL AND ERROR, § 1713\***—*when assignment of error waived.* A question which is not argued or suggested in the opening brief of plaintiff in error cannot be raised for the first time in a reply brief, but is waived.

3. **APPEAL AND ERROR, § 831\***—*when bill of exceptions to be taken and filed.* A bill of exceptions must be taken at the time the event referred to occurs unless an order is obtained from the court extending the time, and must then be presented within the time of the extension.

4. **INTOXICATING LIQUORS, § 147\***—*when evidence sufficient to support conviction.* Evidence on an indictment for the sale of intoxicating liquors in violation of law, examined and *held* to support conviction.

NIEHAUS, J., dissenting.

Error to the County Court of De Kalb county; the Hon. DAVID T. SMILEY, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.

ALSCHULER, PUTNAM & JAMES, for plaintiff in error;  
THOMAS M. CLIFFE, of counsel.

LOWELL B. SMITH, for defendant in error; E. M. BURST, of counsel.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

On October 31, 1914, the grand jury of DeKalb county returned into the Circuit Court an indictment against Hiram Gilmore, containing eleven counts, wherein he was charged with various offenses against the liquor laws of this State. The indictment was certified to the County Court for process and trial. There was a change of venue from the county judge, and the county judge of another county tried the case. Gil-

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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more pleaded guilty to the first three counts of the indictment and was fined thereunder and paid the fine in open court. The State's Attorney dismissed the remaining counts except the eleventh. Gilmore pleaded not guilty. A jury was waived. A stipulation as to the facts was prepared and signed by the State's Attorney and by Gilmore and by his attorneys, in which stipulation he waived various questions. The cause as to said eleventh count was tried by the judge without a jury upon said stipulation. Gilmore was convicted of maintaining a nuisance as charged in the eleventh count, and was sentenced to pay a fine and to a short imprisonment, and it was further adjudged that the place so kept as a common nuisance be abated until Gilmore should give a bond, with security approved by the court, in the penal sum of \$1,000, conditioned that he would not sell intoxicating liquors contrary to the laws of the State, and would pay all fines, costs and damages assessed against him for any violation thereof. This is a writ of error to review that judgment.

In his reply brief, Gilmore contends that when the court had entered judgment under the first three counts of the indictment it possessed no jurisdiction to try him thereafter under the eleventh count. The course pursued was in harmony with the views expressed by this court in *Gaul v. People*, 136 Ill. App. 445. That judgment was reversed by the Supreme Court in *People v. Gaul*, 233 Ill. 630. Gilmore relies upon the latter decision as requiring the reversal of the present judgment. There are several answers which we deem sufficient. This point was not raised in the trial court. According to the record before us, Gilmore pleaded guilty to the first three counts of the indictment, and was fined thereunder and paid the fine in open court, and the State's Attorney dismissed all the remaining counts except the eleventh, all on January 26, 1915, and thereafter on the same day Gilmore executed and filed in the cause a waiver of a trial by jury and submit-

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ted the caused to trial by the court without a jury, and both parties agreed in writing that the cause should be heard upon a stipulation as to the facts which was that day filed in the cause. The stipulation, signed by Gilmore personally and by the attorneys for both parties, contained the following language: "It is hereby stipulated and agreed \* \* \* that said cause shall be and it is hereby submitted \* \* \* upon the following agreed facts, the eleventh count in the indictment being the only count in the said indictment for trial in this cause." The cause was tried on February 20, 1915, and Gilmore was then found guilty under the eleventh count, and the judgment here assailed was then rendered. After entering into that stipulation and being tried thereunder without raising this question, we are of opinion he cannot be heard to say in this court for the first time that the previous entry of judgment under the first three counts makes the trial under the eleventh count without jurisdiction. This point is not raised by the assignment of errors in this court, except in language so general that it could not indicate the point to counsel for the People. It was not argued or even suggested in Gilmore's original brief, and thereby we are deprived of any answer which the People might make. Because it was not argued in the opening brief of Gilmore it was waived by him. This is established by many decisions which we need not cite. The time for filing a reply brief was extended, and the extended time expired July 1, 1915. The reply brief, in which this point was raised for the first time, was placed in the hands of the clerk on July 22nd, long after the time for filing reply briefs had expired, and Gilmore never obtained an extension of that time or a leave to file reply briefs after the time had expired, and the reply briefs have not in fact been filed. Aside from that, we do not think Gilmore should be permitted to raise so important a question for the first time after the brief of the other side has been filed. If technicalities are

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to be brought in after the time for filing even reply briefs has passed, we suggest to Gilmore's counsel that there is not in this record, which is certified to be complete, any leave to present a bill of exceptions after the rendition of the judgment. The bill was signed on March 4, 1915, some time after the judgment. It is, we believe, established law that a bill of exceptions must be taken at the time the event referred to occurs, unless an order is obtained from the court extending the time, and then it must be presented within the time of that extension. This record contains neither leave to present a bill of exceptions nor any extension of the time to present it beyond the day of judgment.

The statement of facts contains 24 typewritten pages, besides numerous exhibits. The place described at length in the eleventh count is the first story of a building known as 352 West State street, in the City of Sycamore. Gilmore was a tenant of said first floor until July 1, 1914. That territory was what is known as wet territory until May 7, 1914, and Gilmore kept a saloon therein until that time under a license so to do. He had not only sold liquors at retail there but also sold liquors at wholesale in said City of Sycamore from that place, and he owned a team and wagon with which to deliver liquors bought at wholesale, and had in his employ a driver named Hurley. Gilmore bought all his beer of the Aurora Brewing Company, hereinafter called the brewing company, whose plant was in the City of Aurora, in Kane county, thirty miles distant from Sycamore. Aurora is wet territory. On May 7, 1914, the town of Sycamore, which included said City of Sycamore, became anti-saloon territory under the statute of this State on that subject (J. & A. ¶ 4637 *et seq.*), and has ever since so remained. About August 1, 1914, the brewing company obtained a lease of said first floor of said building in Sycamore and a club was organized in Sycamore and named the "Sycamore Social Club," which at first had twelve members, and at the



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time of this indictment had one hundred members. It has in its rooms chairs, settees, tables, newspapers and magazines, lockers for beer and an ice chest previously used in the saloon and intended to cool beer. The brewing company had owned the fixtures in the saloon, and they still remained in the same room when this indictment was returned, but the ordinary bar equipment was not used by the club. The brewing company put in a partition cutting off the front part of this building from two rooms in the rear. One Rupp had been district manager at Aurora for the United States Express Company for many years, until it retired from business in the spring of 1914. About July 1, 1914, Rupp reorganized an express company known as the Fox River Express Company, and hereinafter called the express company. He became manager of the express company, and an employee of the brewing company became its president. The brewing company had a downtown branch office at 82 New York street, Aurora, and had a lease of that building. It sublet one room in that building to the express company, and the express company used it as its main office. The collections of the brewing company were made from that building, and this employee who became president of the express company was also collector for the brewing company and did that business in the same building. Both names, that of the brewing company and that of the express company, were on the same front door which constituted the only front door of admittance to the building. The front room of said building in Sycamore was made an office of the express company, and Gilmore was made its agent at a salary of \$75 per month. Gilmore took an active part in organizing said club, and became its treasurer and handled all its moneys. The brewing company leased the two rear rooms to the club. These two rooms included most of what had been the saloon. Hurley, Gilmore's former driver, was made custodian of the clubrooms, and Gil-



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more assisted Hurley in that work. Gilmore collected an initiation fee of fifty cents from each member, which was used for the purpose of buying such member a key to the door from the express office into the club and a padlock and key to a locker inside the club. Gilmore collected dues of twenty-five cents per month in hot weather and thirty-five cents per month in cold weather from each member. He paid the rent, the janitor service, the bills for lighting and heating and ice, and at the time of this indictment had never made any report to the club of his receipts or disbursements. Gilmore sold his team and wagon used by him in the wholesale liquor business in Sycamore to the express company, and Hurley, formerly his employee, became the driver of said conveyance for the express company. In said front room used as the office of the express company, Gilmore sold cigars, tobacco and snuff, and there were upon its counters blank orders addressed to the brewing company for beer. These orders were also to be found inside the clubrooms. A person, whether a member of the club or not, wishing to order beer by the case, filled out a blank, specifying the amount of beer required and the price, and signed it and bought from Gilmore an express money order for that amount, with twenty-five cents added thereto for the charges of the express company for conveying each case of beer, and paid three cents for the money order, and put the order for the beer and the money order in an envelope. Envelopes already addressed to the brewing company at Aurora were always upon these counters, and were generally but not always used. After the envelope had been sealed, Gilmore sold the party a postage stamp if he was not supplied with one. The parties could take this envelope to a United States mail box if they desired, but there was a private mail box inside this room in which the orders were generally placed. Whenever he saw fit, Gilmore called a United States mail carrier to come and take out the orders in the box, and

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this was done. When the order was received by the brewing company at Aurora, it entered it on its books, and caused a case or cases, as ordered, to be duly marked with the name and address of the person who signed the order, and if that person was a member of the club the address was 352 West State Street, Sycamore, Illinois. This case or these cases were then placed upon the shipping platform of the brewing company at Aurora, and taken by the express company and carried to Sycamore, sometimes with their auto trucks and horses and wagons, but more generally over the Northwestern Railroad. The shipment was then placed in a warehouse at Sycamore which the brewing company owned and used until this became dry territory, and then leased to the express company, and Gilmore or Hurley then hauled the shipment to the club, if it was ordered by a member, and to the residence of a consignee who was not a club member. Gilmore then opened the case of the club member and placed the bottles in the locker belonging to the member whose name had been signed to the order. It would seem, therefore, that he had a key to each of these lockers. There was only one door of entrance to the clubrooms and that was from the front office. It was locked, and bore a sign "For members only." Each member had a key to that door. When a member had ordered beer which had been placed in his locker and he wished a drink, he opened his locker and took out one or more bottles. There was in the old saloon an ice chest which still remained there when these became clubrooms. It had two compartments, one marked "Hot" and the other "Cold." The member would take his bottle and place it in the side marked "Hot" and then would open the side marked "Cold" and take out a bottle. The rules of the club required that each member should mark on his bottle, when he took it out of his locker, the number of his locker, and it was intended by the rules of the club that when he took a bottle or bottles out of the cold side of the ice chest he should only take

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bottles bearing his number on the cap, placed there by himself. This part of the arrangement, however, failed. The members did not put the numbers of their lockers, respectively, on their bottles of warm beer. The ownership of each bottle therefore could not afterwards be ascertained, and when a member put a bottle into the hot side of the ice chest he put it into the common stock, and when he drew a bottle from the other side he had no means of knowing that he was taking beer which he himself had paid for, but he was drawing a bottle merely from a common stock, and all efforts to keep them separate by having separate bottles in individual lockers ended when a bottle was placed in the ice chest. Thereafter the members simply used beer from the common stock. It is admitted in the stipulation that the beer was intoxicating liquor. Neither Gilmore nor any one else had any license to sell liquor at that place. No United States license or internal revenue tax receipt had been obtained for the place. Members were permitted to enter it at all times from seven o'clock in the morning until eleven o'clock at night of each day, including Sunday. There was a membership committee of three, who were also the board of directors. No one could be admitted a member except by the consent of two of those three. Gilmore was a member of that committee. The applications were generally made to Gilmore, and he generally admitted the member at once, but sometimes he required the party to wait a day or two until he consulted the others, and some persons were rejected who had applied for membership. Gilmore and others frequently invited persons to become members who had not made application. The brewing company charged the members of this club more for its beer than it did other people. At first this seems strange. If, as contended, the only connection the brewing company had with this matter was that it received at Aurora by mail an order for one or more cases of beer

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to be consigned to a certain party in Sycamore, and, with the order, received pay in full for the beer and the charges for transportation, and all it then had to do was to mark the cases with the name of the consignee and place them on its shipping platform, and its connection with the matter was then ended, no reason is perceived why it should charge the members of this club more than other customers. A computation of the expenses of the club as stipulated and of the dues which the members were to pay will show that the income from the members was less every month than the expenses of the club, even after it had one hundred members, and must have been much less when the membership was smaller. The monthly expenses of the club were \$30 or more in warm weather and \$35 or more in cold weather. When it had twelve members its receipts from dues, its sole income, was \$3 per month, and when it had fifty members its income was \$15 per month in warm weather and \$17.50 per month in cold weather. At the time of this indictment its monthly income was \$25 in warm weather and \$35 in cold weather. If that loss in some way fell upon the brewing company, then a reason would appear why the brewing company should charge the club more for its beer. The express company not only has its office in a part of the brewing company building but it does very little business except to transport the beer of the brewing company, and four-fifths of the towns to which it conveys the beer of the brewing company are dry territory. It transports no beer except that of this brewing company. All the beer this brewing company ships into dry territory it ships by this express company. The by-laws of the express company reserve a right to reject any and all shipments. The express company has all the legal forms of organization of a common carrier. The provision that it may reject shipments is probably void if the question arose between the express company and a person who offered shipments

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which it refused, but it is a circumstance having some bearing upon the question what the real relations were between the brewing company and the express company and Gilmore and the club. It tends to show that the express company intended in advance to reject general shipments and intended to accept little business except that of the brewing company, and prepared this by-law to discourage general shipments, and to enable it to justify the rejection of other shipments. No stockholder or officer in the brewing company owns any stock in the express company. Each company had forms and blanks and books indicating that each had a separate organization and business life.

The first sentence of section 12 of the act for the creation of anti-saloon territory (Hurd's Rev. St. 1913, p. 1028, J. & A. ¶4648) is as follows: "Whoever shall, by himself or another, either as principal, clerk or servant, directly or indirectly, sell, barter or exchange any intoxicating liquor in any quantity whatever, within the limits of any political subdivision or district in this state, while the same is Anti-Saloon Territory, shall be fined not less than twenty dollars (\$20), nor more than one hundred dollars (\$100), or imprisoned in the county jail for not less than ten (10) days nor more than thirty (30) days, or both, in the discretion of the court."

Section 13 (J. & A. ¶4649) is as follows:

"The giving away or delivery of any intoxicating liquor for the purpose of evading any provision of this act, or the taking of orders or the making of agreements, at or within any political subdivision or district while the same is Anti-Saloon Territory, for the sale or delivery of any intoxicating liquor, or other shift or device to evade any provision of this act, shall be held to be an unlawful selling."

The general dramshop act contains similar provisions in regard to shifts and devices to evade the provisions of the act. These provisions in regard to a

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shift and a device have been considered and construed in Illinois in the following cases: *Rickart v. People*, 79 Ill. 85; *People v. Law and Order Club*, 203 Ill. 127; *South Shore Country Club v. People*, 228 Ill. 75; *People v. Gardt*, 175 Ill. App. 80, and 258 Ill. 468; *City of Decatur v. Schlick*, 269 Ill. 181; and *People v. Craig*, 155 Ill. App. 73. As the discussion of a shift and a device in those cases is accessible to the profession, we need not repeat the various schemes to evade our liquor laws which the courts there held to be mere shifts and devices. There are, in various other States of the Union, like statutory provisions, and like decisions covering many different kinds of schemes intended to enable the parties resorting thereto to avoid the penalties of legislation of this character, and which have almost uniformly been held by the courts to be mere shifts and devices. Very many of the features that are prominent in the arrangement here adopted will be found in some of those cases.

We will briefly restate the relation between the brewery and the express company and the club, so far as it is revealed by the evidence. This defunct express company was not revived until the anti-saloon territory act had become effective in Sycamore at least, and, it is a fair inference from the language of the stipulation, in other cities, and villages in northern Illinois. Its president is an employee of the brewing company. It has its main office in Aurora in a room which it rents from the brewing company in a building the rest of which is occupied by the brewing company, and said president of the express company works for the brewing company in that building. There is but one front door of entrance into the downtown office of the brewery in Aurora and the main office of the express company, and the names of both companies are on the front door. The express company bought part of its horses and trucks from the brewing company. The brewing company owns a warehouse in Sycamore

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for the storage of beer, which was used by it for that purpose until Sycamore became dry territory. Soon after it became dry territory, the brewing company leased this warehouse to the express company. Gilmore operated a saloon in the first floor of a building in Sycamore until this became dry territory. Soon thereafter the brewing company rented the first floor of that building. Gilmore at that place had sold at retail and wholesale the beer of this brewing company exclusively. Hurley was his driver to carry cases of beer from the warehouse about the town. When this became dry territory the express company bought from Gilmore the truck and team so used in Sycamore, and hired Hurley as its driver. Gilmore took an active part in the organization of the club. He became its treasurer, and handled all its money. Hurley and he performed the duties of custodian of the clubrooms. Gilmore actively exerted himself in procuring men to join the club. He sometimes hauled the beer from the warehouse to the club, and if Hurley hauled it, Gilmore received it at the club. He usually placed the beer ordered by each member in the locker of that member. He must necessarily have had a key to each of the one hundred lockers in order to enable him to do that. He pays the rent and the charges for lighting and heating and ice and janitor services. He shows each person who wishes to order a case of beer how to do so, if he needs assistance, sells him the money order for the price of the beer and the express charges, and receives the money. He directs the inclosure of the money order and the order for the beer in an envelope, to be placed in a private box inside the front room of the building, and tells the mail carrier when to come and get it and take it away. He is one of the three members of the membership committee, and two of said members can determine who shall be received as a member. It is impossible but that he and Hurley have obtained for membership in said club many of



the regular patrons of his former saloon. The stipulation does not tell on what grounds persons who applied for membership have sometimes been refused, but the fact that the only revenue to be received there either by the express company or the brewing company must arise from the sale of beer would furnish an incentive to admit persons who were likely to be considerable consumers of beer and to be able to pay in advance therefor. Very likely they might reject persons whose presence in the club would be undesirable. The stipulation contains the following: "No intoxicating liquor of any kind has been carried, stored or delivered by said Fox River Express Company or by said defendant as its agent which has not been ordered by an order mailed as above set forth from dry territory into wet territory, nor has any liquor been carried, stored or delivered by said express company or said defendant as its agent which has not been labeled with the name of the purchaser and delivered to said Fox River Express Company by the seller in wet territory." Strictly considered, this language means that the Fox River Express Company has not carried, stored or delivered any intoxicating liquor except on orders mailed in dry territory, and if that is its meaning, then the sole business of this express company, so far as it relates to liquor, has been to take liquor into dry territory and deliver it there. Other portions of the stipulation show that only four-fifths of the towns to which it carries the brewing company's beer are dry towns. It is clear that the express company has very little business except carrying intoxicating liquor from this brewery into dry territory, and it is stipulated that it carries no intoxicating liquor except the beer of this brewing company. This express company has not the indicia of an ordinary express company seeking general business. It has a rule which permits it to refuse any shipment that it does not wish to take.



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It has shipped nothing into Sycamore except intoxicating liquor and some cases of mineral water.

The court is of opinion that if these facts were considered by a well-informed person who was neither juror nor judge, he would say at once that this was a system which had been devised to enable the parties to put the beer of the brewing company into dry territory and into places where men congregated to drink it, and to give it the legal appearance of an order for liquor received, filled and delivered to a common carrier in wet territory. Why should a juror or judge take any other than such common and reasonable view of the real nature of this business arrangement? This club is substantially the saloon which Gilmore previously kept there. If its rules are strictly carried out, a stranger on the street could not go in and get a glass of beer at once, but he would have to be passed upon by two members of the membership committee, and wait two or three days for an order for beer to reach Aurora and for the beer to be returned. But for all the regular habitues and friends and customers of Gilmore it possesses practically the same opportunities, and it is just as feasible and just as lawful on Sunday as any other day, and it pays no revenue to the State. True, each member has to help himself to liquor, but this is an unimportant detail. This is a place where those who are willing to be the customers of Gilmore meet from seven a. m. to eleven p. m. of all the days of the week, to drink intoxicating liquor which they obtain through the assistance of Gilmore and others. The plan is artfully devised, but we entertain no doubt that it is a scheme or device to avoid the liquor law. If this can be done in this saloon building by Gilmore, it can be done in every other place in Sycamore which was a saloon before the territory became dry. If this can be lawfully done in Sycamore and by this brewing company, it can also be done in all other dry territory in this State by every other brewery and distillery, and

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the statute in question can be practically defeated. We are of opinion that this express company is not a real express company, but it is a part of a device and agency of the brewing company to deliver its beer in Sycamore and other dry territory; that its receipt of orders and money in Sycamore and delivery of beer in Sycamore is really the act of the brewing company, done in Sycamore, and that Gilmore, who receives the original money and who delivers the beer, is really an agent of the brewery company, and is violating this statute in dry territory.

If, however, this be treated as a genuine express company, and the beer be considered as delivered by the brewing company to the consignee in Aurora, nevertheless it appears from this stipulation that when a member places his bottles in the hot part of the ice box he does not place the number of his locker thereon, and therefore they are immediately merged in the common stock placed by the members in that side of the ice box, and when he takes bottles out of the cold side of the ice box he has no means of knowing that he is taking out his own bottles, but he is merely taking bottles from a common stock. The having of liquor in a common stock in a club has been held a shift or device, and invalid. (*People v. Law & Order Club, supra; South Shore Country Club v. People, supra*); and it cannot be but that Gilmore, who takes the money, directs when the order therefor shall be mailed, receives the beer and puts it in the locker, and who assists the custodian in charge of the room, and who is in effect the manager of the club, knows that the liquors there drank are taken out of a common stock, and knows that this is not a case where each man actually drinks the liquor which he himself purchased. For that reason also he is a violator of this statute.

Since the foregoing opinion was prepared, the Supreme Court has denied a rehearing in the four cases consolidated as *City of Decatur v. Schlick, supra*.

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We therefore wish to call attention to the facts that the City of Decatur was dry territory, that the ordinance there involved contained practically the same provisions as the act for the creation of anti-saloon territory, and that in those cases the defendants who were held rightfully convicted of violating the provisions of the ordinance did not own the liquors there used at the clubs there described, or have any interest in said liquors. Each member of those clubs bought his liquors elsewhere and had them delivered at his club. The defendants merely received and kept the liquors and served to each member his own liquor which he had bought and paid for elsewhere. The places had been saloons kept by the defendants before the territory became dry, and after it became dry they only kept and served to each member his own liquor. Defendants did not buy or order the liquor or handle any money spent for liquor. They only stored and served the liquor. They were paid only for such service. Yet it was held that they were violating the provisions of section 15 of the ordinance (which was the same as section 13 of the Act), in the delivery to the consumer of intoxicating liquors for the purpose of evading the provisions of the ordinance, and in making agreements for the delivery thereof; and that their methods of conducting the business were shifts and devices which authorized their conviction for unlawful selling. The application of the principles there stated to the facts of this case seem to us to fully justify the judgment here presented for review.

Under section 14 of the Anti-Saloon Act (J. & A. ¶4650), the place where the law is thus violated is a common nuisance and may be abated as such, and the judgment of the court below is therefore authorized by the law and the evidence. The judgment is affirmed.

*Affirmed.*

MR. JUSTICE NIEHAUS, dissenting.

I am unable to concur in the decision of the court affirming the judgment of conviction of the plaintiff in error. Plaintiff in error is charged with unlawfully keeping a certain place, namely, the first floor of a building situated at No. 352 West State Street, in the City of Sycamore, in the Township of Sycamore, which is anti-saloon territory, and unlawfully selling intoxicating liquor there, whereby the place became a common nuisance. The guilt of the plaintiff in error is to be determined from certain facts which are stipulated, and the stipulated facts should furnish the proof of guilt. I am of opinion that they do not show that the plaintiff in error actually or constructively sold any liquor in the place in question, nor that he was the keeper of the place. The liquor handled in this place was beer, and it is perfectly clear that this beer was purchased and owned by individual members of a certain club, known as the "Sycamore Social Club." At the time of the indictment, the club had about one hundred members, and was composed of farmers, business men, masons, contractors, former saloon keepers, laborers, factory workers and others. Individual members of this club purchased beer in bottles and by the case from the Aurora Brewing Company at Aurora, in Kane county, a locality which is admitted to be wet territory. This beer, when purchased, was consigned by the brewing company to the several members of the club, who were purchasers, and delivered to the Fix River Express Company, at Aurora, for the consignees at DeKalb. It is conceded that the Fix River Express Company is an Illinois corporation, organized for the purpose of carrying on a general express, transfer and cartage business, and chartered to do business as a common carrier, and doing business as such carrier in the counties of Kane, Winnebago, Boone, McHenry, Ogle, Whiteside, Lee, DeKalb, DuPage, Will, LaSalle, Grundy and Kendall. As such carrier it not only had the right, but was legally obligated to transport

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the goods received from the Aurora Brewing Company, even though they were intoxicating liquors, to the consignees at Sycamore, and to transfer them into their possession. The plaintiff in error is the agent of this express company at the Sycamore end of the line; and he handled this beer, which was the beer of the several consignees, as such agent, to put the consignee into possession of the property which the company had transported for them.

It also appears from the stipulation that the Fox River Express Company occupied the front room of the first floor of the building in question, and that the "Sycamore Social Club" occupied the room adjacent, which was the rear room; that is, the express company had possession as tenant of a room which was a part of the first floor of the building in question, and the "Sycamore Social Club" was in possession as tenant of the other room on this floor; and I am unable to see how the plaintiff in error could be held to be guilty of keeping a place, and conducting a nuisance therein as a matter of law, when, as a matter of fact, the place was kept and maintained by other parties. Nor does it appear to me to be material to the issue here, how the ice box, used by the members of the club, was constructed, nor the manner in which members iced their beer; nor is it any evidence of the guilt of the plaintiff in error that the members of the club were careless in marking their beer bottles; nor, that by their carelessness in that regard, they sometimes got their bottles mixed; nor is it any legitimate evidence of the guilt of the plaintiff in error, of the charge upon which he was tried, that before he became the agent of the Fox River Express Company, and before the club occupied the premises mentioned, he had conducted a saloon, illegally sold liquor in these premises, and pleaded guilty to such illegal selling; nor are these facts embraced in the stipulation.

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It is true the plaintiff in error sold express money orders, as agent of the Fox River Express Company, in the usual course of his employment as agent of the company, and knew that the express orders, which he sold to the members of the club, would be used by them in the purchase of beer from the Aurora Brewing Company; but as these purchases of beer were to be made in wet territory, this did not involve a violation of law; and it is also clear that the plaintiff had no interest whatever in such purchases, either directly or indirectly. If there is any shift or device involved in this case, it does not appear to be one carried on by the plaintiff in error. In my opinion the stipulation of facts does not show that the plaintiff in error is guilty of the offense with which he is charged, and the judgment of conviction should, therefore, be reversed.

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**Village of Franklin Grove, Appellee, v. Chicago & Northwestern Railway Company, Appellant.**

**Gen. No. 6,073.**

1. MUNICIPAL CORPORATIONS, § 90\*—*when ordinance not void as unreasonable.* An ordinance of a village requiring a railroad company to erect, maintain and operate gates at each of four different crossings is not invalid as to all of such crossings merely because it is found to be unreasonable as to one of them, the provision for gates at any one of such crossings not being in any way inseparably connected with the provision for gates at the other streets.

2. MUNICIPAL CORPORATIONS, § 85\*—*when provision in ordinance for daily penalty does not invalidate.* An ordinance providing for the erection and maintenance of gates at certain crossings is not void because it makes each day's failure to obey a separate offense.

8. RAILROADS, § 628\*—*when requirement for gates at crossing reasonable.* Evidence in an action against a railroad company to recover penalties for failure to comply with the village ordinance requiring the erection and maintenance of gates at certain crossings,

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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examined and *held* to show that such ordinance was reasonable as to one street but unreasonable as to others.

4. RAILROADS, § 626\*—*when ordinance requiring operation of gates unreasonable.* A village ordinance providing for the erection, maintenance and operation of gates at street crossings in the village is unreasonable where it requires the gates to be operated the entire twenty-four hours of the day.

5. EVIDENCE, § 22\*—*when court will take judicial notice of railroad conditions.* In an action against a railroad company to recover fines for failure to comply with an ordinance regulating the erection, maintenance and operation of gates at crossings in the village, the court will take judicial notice of conditions which ordinarily exist in a rural community, and that after the affairs of the day and evening are ended, the ordinary statutory signals of bell and whistle and the headlights of the trains are sufficient for a period extending at least from midnight to six a. m.

6. RAILROADS, § 626\*—*when penalty for failure to maintain and operate crossing unreasonable.* In an action to recover penalties for failure of defendant railroad company to comply with a village ordinance requiring the erection, maintenance and operation of gates at certain street crossings in the village under a penalty of from \$10 to \$200 for each violation thereof, the provision for the penalty renders the whole ordinance unreasonable and void, for the reason that it would permit a verdict against the defendant of a disproportionately large sum.

7. RAILROADS, § 626\*—*when not estopped to question of validity of ordinance.* The fact that a railroad company has erected and maintained gates at one of four crossings at which said gates are required by village ordinance does not estop it to question the validity of such ordinance in an action to recover penalties for its failure to comply with the provisions as to the other crossings.

8. RAILROADS, § 626\*—*how ordinance relative to crossings affected by Public Utilities Act.* *Quaere*, as to what effect the adoption of the Public Utilities Act (Laws 1913, p. 455) has upon the right of a village to adopt an ordinance requiring a railroad company to erect, maintain and operate gates at crossings in the village and to provide a penalty for failure to comply therewith.

Appeal from the Circuit Court of Lee county; the Hon. OSCAR E. HEARD, Judge, presiding. Heard in this court at the April term, 1915. Reversed with finding of facts. Opinion filed October 20, 1915.

C. B. MORRISON, HENRY S. DIXON and GEORGE C. DIXON, for appellant.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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TRUSDELL, SMITH & LEECH, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

The Chicago and Northwestern Railway Company operates a double track railway through the Village of Franklin Grove, running from a direction north of east to south of west, and the line is straight in and a long distance on either side of said village. It is crossed by four north and south streets in said village, which counting from east to west are named Sycamore, Elm, Spring and State. On August 4, 1913, the board of trustees of the village passed an ordinance requiring the railway company, not later than November 1, 1913, to erect and thereafter to maintain and operate gates at each of said four crossings and provided a penalty for failure to so erect, maintain and operate said gates, or either of them, of not less than \$10 nor more than \$200, and the ordinance provided that each day of such failure should be a separate offense. About one year thereafter the railway company erected and has since maintained gates at Elm street, but has not erected gates at either of the other crossings. On April 3, 1914, and before the erection of said gates at Elm street, the village began this action of assumpsit against the railway company to recover penalties for noncompliance with said ordinance. The railway company filed a plea of the general issue and a plea that said ordinance was unreasonable and void and therefore it is not bound to construct and maintain any gates and is not liable to any penalty for failure to do so. There was no replication to this second plea, but the parties went to trial and thereby waived a formal issue. A jury was waived, proofs were heard, the court by a proposition given for the defense held the ordinance invalid as to Spring street, found the issues for plaintiff and gave judgment for \$150, from which the railway company appeals.



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It is contended that since the court found the ordinance unreasonable and void as to Spring street, therefore the entire ordinance should have been found void. It was held in *White v. City of Alton*, 149 Ill. 626, to be "a well settled principle, applicable to by-laws and ordinances, that if the provisions relating to one subject-matter be void and as to another they be valid, and the two are not necessarily or inseparably connected, they may be enforced as to the valid portion as if the void portion had been omitted." This principle has been announced and applied in many different ways in *Nelson v. People*, 33 Ill. 390; *Kettering v. City of Jacksonville*, 50 Ill. 39; *Harbaugh v. City of Monmouth*, 74 Ill. 367; *Baker v. Town of Normal*, 81 Ill. 108; *City of Quincy v. Bull*, 106 Ill. 337; *Poyer v. Village of Des Plaines*, 123 Ill. 111; *Wilbur v. City of Springfield*, 123 Ill. 395; *Donnersberger v. Prendergast*, 128 Ill. 229; *Freeport St. Ry. Co. v. City of Freeport*, 151 Ill. 451; *City of Belleville v. Citizens' Horse Ry. Co.*, 152 Ill. 171. The provisions for gates at one of these streets is not in any way inseparably connected with the provision for gates at the other three streets, and therefore the trial court was not required to find the ordinance unreasonable as to the other streets because it was unreasonable as to Spring street.

It is contended by the railway company that the ordinance is void because it makes each day's failure to obey it a separate offense. We are of opinion that that provision was valid, and that if the city could only impose a single penalty for a perpetual failure to obey a valid ordinance, then under the 98th clause of section 1 of article V of the Act pertaining to cities and villages (J. & A. ¶1334 [98]), which limits cities to a fine or penalty of \$200 for each violation of an ordinance, this would result in making such a fine or penalty entirely insufficient to procure the enforcement of the ordinance. This court is committed to the principle that each day may be made a separate offense. *Village of*

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*Hampton v. Chicago, M. & St. P. Ry. Co.*, 118 Ill. App. 621, and 125 Ill. App. 412. It is perhaps implied in *Village of Altamont v. Baltimore & O. S. W. Ry. Co.*, 184 Ill. 47, that such a provision is valid, if embodied in an ordinance. In *Horr & Bemis on Municipal Police Ordinances*, sec. 152, it is said that it is lawful to provide an initial fine for creating a nuisance and an additional fine for each day of its continuance. We hold the ordinance not void because of the daily penalty prescribed therein.

Franklin Grove has less than six hundred inhabitants within the municipality. It has been decreasing in population for many years. Outside the municipality it has a population of about one hundred. Two-thirds of this village population is south of the railway. Its business portion is south of the railroad and all of its churches but one. Its depot and stock yards and other structures are south of the railway. The proof largely consisted of the results of counting the number of foot passengers, teams and automobiles passing over the railway tracks at each street crossing on numerous days specified; and of the statement by witnesses of a few accidents and several near accidents caused by people going or driving upon the track when a train was approaching; and of the description of how trees and buildings interfere with the view of travelers on the highway approaching the crossings at certain places; and of proof that outside of the village but near by, a campmeeting is held six days each year and a chautauqua on the same grounds eleven days each year. It would be impracticable to recite this evidence in this opinion. We think it is sufficient to say that, upon a consideration of this evidence, the court is of opinion that it is reasonable to require gates at Elm street, now known as the Lincoln Highway; that it is unreasonable to require gates to be maintained at Spring and State streets, and that the majority of the court are of the opinion that it is unreasonable to require gates at Syca-

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more street. The writer of this opinion concludes that because of the six tracks crossing Sycamore street and the obstruction to the view caused by the depot and other buildings, it is reasonable to require gates to be maintained at the latter street.

We are of opinion that the ordinance is unreasonable in its entirety in two other respects. It requires the gates to be operated the entire twenty-four hours of the day. We are of the opinion that in this rural community we may take judicial knowledge of the conditions which ordinarily exist and that after the affairs of the day and evening are ended and the silence of night prevails, the ordinary statutory signals of bell and whistle and the headlights on all trains, necessarily visible a long distance on this straight track, are all that should be required of the railroad company, at least from midnight to six a. m. and perhaps for a somewhat longer period. The ordinance permits a penalty of from \$10 to \$200 for each violation thereof. This would allow a jury to assess a penalty of \$73,000 for the failure to erect any one of these gates for a year, or \$292,000 for failure to erect the four gates for one year. The penalty should be sufficient to insure obedience, and \$10 a day would be a reasonable penalty, and perhaps \$25 a day, but a provision which would permit a jury to return a verdict for so large a penalty in our opinion makes the whole ordinance unreasonable and therefore void.

The village contends that the railway company has conceded the validity of this ordinance as to Elm street and that the judgment is much less than the penalties which might be imposed for the failure for nearly one year to erect and maintain gates at that street, and therefore the judgment must be affirmed, regardless of the view the court takes of the validity of the ordinance as to the other streets. We find no place in the record or briefs where the railway company concedes the validity of the ordinance as to Elm street. On

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the contrary, it insists that it is void as to that street. The fact that it finally concluded to comply is not a confession that the ordinance is valid. It ought to be stated that the railway company maintained a flagman at Elm street before this ordinance was adopted and that it has been customary for it to place a flagman at the other streets during the continuance of said chautauqua and said campmeeting, and it may well be that it would be reasonable for the city to require a flagman on those streets during those assemblages, both in the daytime and in the evening.

The Act for the Regulation of Public Utilities (Hurd's Rev. St., ch. 111a) was passed before this ordinance was adopted and went into force before this suit was begun. We suggest the question whether, under section 57 and other sections of that act, the city can now enforce any such ordinance except through the State Public Utilities Commission. For the reasons stated the judgment is reversed.

*Reversed with finding of facts.*

Finding of facts to be incorporated in the judgment.

We find from the evidence that the ordinance in question is unreasonable in requiring gates to be operated at Elm street crossing the entire twenty-four hours of each day, and that the penalty provided for each violation of the ordinance is unreasonable. We find that the ordinance is unreasonable in requiring gates to be erected and maintained at State Street and Spring street. The majority of the court find the ordinance unreasonable in requiring gates to be erected and maintained at Sycamore street.

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**W. C. Foster, Appellee, v. Matt Rudis et al.,  
Appellants.**

**Gen. No. 6,080.**

1. **FORCIBLE ENTRY AND DETAINER, § 95\***—*when form of judgment sufficient.* A judgment in forcible entry and detainer for plaintiff and against defendants "for possession of the premises involved in said cause" while not in approved form, as requiring resort to the complaint for a sufficient description of the premises, is nevertheless sufficient.

2. **APPEAL AND ERROR, § 800\***—*when matter not properly preserved for review.* The fact that a motion for a new trial is preserved in the record kept by the clerk is not sufficient where it is not contained in the bill of exceptions.

3. **APPEAL AND ERROR, § 600\***—*when motion for new trial not essential to right of review.* Even though no motion for a new trial was made, the defeated party may have reviewed on appeal the decisions of the court upon objections to evidence and the like where exceptions thereto have been properly preserved by the bill of exceptions.

4. **APPEAL AND ERROR, § 551\***—*when formal exception not necessary.* Under section 81 of the Practice Act (J. & A. ¶ 8618), as amended in 1911, a party may have adverse ruling reviewed without taking a formal exception thereto.

5. **LANDLORD AND TENANT, § 465\***—*when payment of arrears of rent prevents forfeiture.* If a tenant pays the rent in arrears within ten days after service of notice of default by the landlord, the forfeiture of the lease is thereby prevented.

6. **LANDLORD AND TENANT, § 465\***—*when offer of payment sufficient to prevent forfeiture of lease.* Where a tenant, within ten days after notice served by the landlord of the termination of his lease for failure to pay rent, pays \$375 of the \$400 due and within the same period tenders the remaining \$25 which the landlord refuses, such payment and tender are sufficient to avoid the forfeiture, and no plea of tender is necessary to admit such defense, nor is it necessary that the tender of the \$25 be kept good.

Appeal from the County Court of Lake county; the Hon. PERRY L. PERSONS, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed October 20, 1915.

**GEORGE C. GUTHRIE, for appellants.**

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

FULTON, GAREY & DEUTSCHMAN, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

This was forcible detainer brought in the County Court of Lake county to recover possession of a farm. Defendants pleaded not guilty and there was a jury trial. Defendants offered certain evidence which they claimed established a complete defense. The court sustained objections thereto and directed a verdict for plaintiff, and it was returned and there was a judgment thereon for the recovery of the premises, and defendants prosecute this appeal therefrom.

The judgment was for plaintiff and against defendants "for possession of the premises involved in said cause." We do not approve of this form of judgment. It is exceedingly general. In order to issue a writ of restitution which any officer could safely execute, the clerk must resort to the complaint, where the premises were sufficiently described. If the complaint were lost from the files, the clerk could not issue a sufficient writ. Such a reference to the complaint seems, however, to be justified by the authorities. 1 Freeman on Judgments (4th Ed.), sec. 50c, states the rule as follows: "The property which is the subject of a judgment or decree must also be described with sufficient certainty to leave its identity free from doubt; but the bill or complaint may be referred to in the judgment for the purpose of description. \* \* \* A judgment may be aided by the pleadings and the other parts of the record, and if the description obtainable from it and them would be sufficient if found in a conveyance to divest the title of the grantor, it will be sufficient to sustain sales made or possession taken under the judgment." *Atkinson v. Lester*, 2 Ill. (1 Scam.) 407; *Cairo & St. L. R. Co. v. Wiggins Ferry Co.*, 82 Ill. 230; *Adams v. Pacini*, 119 Ill. App. 428; *Haynes v. Sherwin-Williams Co.*, 126 Ill. App. 414, are examples of judgments which

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could only be sustained by a like reference. In *Haws v. Victoria Copper Min. Co.*, 160 U. S. 303, where it was claimed that the findings and the judgment did not sufficiently identify the premises to enable an officer to execute a writ of possession, the court said: "It is not doubtful that the decree and complaint taken together fully describe and furnish ample means for identification of the property to which defendant in error was adjudged to be entitled." The decree was there affirmed. We applied a like rule in *Stevens v. Cary*, 183 Ill. App. 24.

The bill of exceptions does not contain a motion by defendants for a new trial, and the effort of the clerk to preserve that matter in the record kept by him is unavailing. Appellee contends that because of the absence of that motion from the bill of exceptions, appellants cannot be heard to complain of the refusal of the court to admit evidence offered by them. Whatever decisions there may have been prior to 1908 which appear to support that contention, it was settled in *Yarber v. Chicago & A. Ry. Co.*, 235 Ill. 589, that without a motion for a new trial, the defeated party may have reviewed on appeal decisions of the court upon objections to evidence and the like, if exceptions thereto have been properly preserved by the bill of exceptions. *People v. Faulkner*, 248 Ill. 158. Appellants failed to preserve in their bill of exceptions, exceptions to some of the rulings of the court in refusing to admit evidence offered by them. Under section 81 of the Practice Act, as amended in 1911 (J. & A. ¶8618), a party may have an adverse ruling reviewed without taking any formal exception thereto.

Appellee was the landlord and appellants were his tenants under a written lease, running from April 15, 1913, to December 1, 1914, and with a provision that at the option of the tenants, the lease should be extended to December 1, 1917, at an increased rental specified. On November 16, 1914, appellants served



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a written notice upon appellee of their election to have said lease extended pursuant to said option. On December 1, 1914, \$400 rent became due from appellants to appellee and was not paid. On December 2nd, appellee served written notice upon appellants that in consequence of their default in paying said rent, he had elected to determine their lease, and that he notified them to deliver possession within ten days. He began this suit on December 14th for possession. Defendant sought to prove that on December 4, 1914, they paid appellee \$375, and that on December 5th they tendered appellee the remaining \$25 of said rent, and that he refused to receive it. The court refused to admit this testimony. Appellee claims in support of this ruling that under section 9 of the Landlord and Tenant Act (J. & A. ¶7047), when the tenant fails to pay his rent and the landlord serves such a notice, the lease is thereby terminated, and that the tenant cannot escape from the result and the landlord has a right to possession after ten days. Our Supreme Court in a long line of decisions has held to the contrary and has held that, if the tenant pays the rent in arrears within ten days after service of such notice, the forfeiture of the lease is thereby prevented. Among those cases are *Chadwick v. Parker*, 44 Ill. 326; *Chapman v. Kirby*, 49 Ill. 211; *Cone v. Woodward*, 65 Ill. 477; *Leary v. Pattison*, 66 Ill. 203; *Woodward v. Cone*, 73 Ill. 241. Appellee contends that since these decisions there has been some slight change in the statute, which obviates their force. In 1897, in *Woods v. Soucy*, 166 Ill. 407, since section 9 assumed its present form, this whole subject was reviewed at length, and it was held that by paying rent within ten days after notice a forfeiture was avoided. Appellee relies upon *Dickenson v. Petrie*, 38 Ill. App. 155. That case is not in point. There the notice was given and the tenant did not pay nor offer to pay the rent in arrears within the ten days, and the question what effect payment within the ten days would have had was not presented or decided,



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and, if it were in point, it must be considered as overturned by the later decision in *Woods v. Soucy, supra*.

But appellee contends that appellants could not avail of this defense, and were not entitled to this evidence, because they did not plead a tender nor offer to prove that the tender was kept good. This is not a question of tender in the ordinary sense. Appellants are not being sued for the \$25. If they were, they would have had to keep the tender good in order to avoid costs. The question here is only whether they could avoid the forfeiture by paying \$375 of the rent in arrears and tendering the remaining \$25 to appellee within the ten days. No plea of tender was necessary to admit that defense, nor was it necessary that the tender should be kept good when the last \$25 was tendered within the ten days and forfeiture was prevented, whether the landlord did or did not accept the money.

The judgment is therefore reversed and the cause remanded.

*Reversed and remanded.*

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**Mark Bates, Appellant, v. Estate of Thomas Cronin,  
Deceased, Appellee.**

**Gen. No. 6,083.**

1. **BILLS AND NOTES, § 373\***—*when introduction of note makes prima facie case.* In a claim against an estate on a promissory note where plaintiff introduces the note in evidence and proves that the signature thereto was the genuine signature of the deceased, he makes a prima facie case.

2. **BILLS AND NOTES, § 391\***—*when holder presumed bona fide purchaser.* One holding a promissory note indorsed in blank must be assumed to be an innocent purchaser for value before maturity.

3. **BILLS AND NOTES, § 407\***—*when burden of proving illegal con-*

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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*consideration on defendant.* In an action on a note indorsed in blank brought by the holder, where the defense is that it was given in settlement of differences in trades on the Board of Trade, the burden is on the defendant to establish such defense by substantial proof of the facts constituting alleged defense.

4. **BILLS AND NOTES, § 434\***—*when evidence inadmissible to show illegal consideration.* In an action on a note indorsed in blank brought by the holder thereof, the defense that the note was void because given by the maker in settlement of differences in trades on the Board of Trade in transactions with the payee cannot be established by evidence of transactions with which the payee was not connected and of which he was not shown to have had any knowledge.

5. **BILLS AND NOTES, § 434\***—*when evidence inadmissible to show illegal consideration.* In an action on a promissory note, dated 1906 and indorsed in blank, brought by the holder thereof, where the defense is that it was given to the payee in settlement of differences in trades on the Board of Trade, evidence that the maker had similar transactions with other members of the Board of Trade about 1901 is inadmissible as being too remote.

6. **BILLS AND NOTES, § 434\***—*when evidence inadmissible to show illegal consideration.* Evidence in an action on a promissory note examined and *held* inadmissible to show the illegality of the consideration.

7. **EVIDENCE, § 107\***—*when evidence of telephone conversation inadmissible.* Evidence of a witness as to a telephone conversation which does not state the conversation he held nor his inability to recollect the words used, but merely undertakes to give his opinion of the general result of numerous conversations, is inadmissible, especially where he does not testify that the person with whom the telephone conversation was had, had a telephone nor give its number nor state that he heard the other person call that number and get it.

8. **BILLS AND NOTES, § 443\***—*when evidence insufficient to show illegal consideration.* Evidence in an action to recover on a promissory note, examined and *held* insufficient to show that the note was given in settlement of differences in trades on the Board of Trade.

Appeal from the Circuit Court of Grundy county; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed October 20, 1915.

ANDREW J. REDMOND, SIMON LA GROU and GEORGE BEDFORD, for appellant.

CORNELIUS REARDON, for appellee.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

On November 15, 1907, Mark Bates filed a claim in the County Court of Grundy county against the estate of Thomas M. Cronin, deceased, based upon a promissory note dated August 3, 1906, for the principal sum of \$3,832.25, for value received, signed "Cronin Bros." and "T. M. Cronin," payable to the order of Doyle Brothers and by them indorsed in blank. Two payments of \$100 each were indorsed upon said note. On July 15, 1908, said claim was allowed in the sum of \$3,770.29 as of the seventh class. The executor appealed to the Circuit Court. In March, 1910, there was a jury trial and the jury disagreed. In October, 1914, upon another jury trial, there was a verdict for defendant. A motion by plaintiff for a new trial was denied, the estate had a judgment for costs and plaintiff below appeals.

Appellant introduced the note in evidence and proved that the signature, "T. M. Cronin" thereto was the genuine signature of Thomas M. Cronin, deceased. This made a case for plaintiff. There was a firm of Cronin Brothers in the hardware business at Morris, composed of Daniel J. and Thomas M. Cronin. Daniel J. Cronin died June 5, 1903. Thomas continued the business and apparently in the name of Cronin Brothers until he died, on July 4, 1907. Doyle Brothers was a Chicago firm, dealing in grain on the Board of Trade, and had done business for Cronin Brothers in 1905 and 1906. The sole defense interposed to this note is that it was given in settlement of differences in trades on the Board of Trade. It is claimed that the note is void and therefore not collectible in the hands of Bates (who must be assumed to be an innocent purchaser for value before maturity), under section 131 of the Criminal Code. The effect of the statute just cited is thus stated in *Schneider v. Turner*, 130 Ill. 28: "All contracts for the purchase

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and sale of property with the understanding or agreement of the parties (whether that agreement is expressed on the face of the contract or exists by secret understanding) that the property is not to be delivered or accepted, but the contract satisfied by an adjustment of the difference between the contract and market prices, are mere wagers, or gambling contracts, and void." The burden is on the defense to establish such a defense, and the rights of a bona fide holder of such paper, who is not shown to be connected in any way with the immorality alleged to be involved in the transaction, cannot be cut off by mere surmise or conjecture, but there must be some substantial proof of the facts constituting the alleged defense. *Bank of Montreal v. Griffin*, 154 Ill. App. 616.

The defense called Fred J. Blasingham, who testified, over objections by appellant, that he had represented several Chicago parties who dealt upon the Board of Trade and that Cronin had various deals with said parties through him and in no case was any grain ever delivered in his dealings with Cronin, but the transactions were closed by the payment of the profit or loss. He named five different Board of Trade firms for whom he had done that kind of business. Doyle Brothers were not named by him, and he did not profess to know anything about dealings between Cronin or Cronin Brothers and Doyle Brothers. It was not shown that Doyle Brothers had any knowledge of those dealings. It may be that under the authorities, if the evidence had shown that Doyle Brothers had had transactions in grain with Cronin or Cronin Brothers and that they were settled by payment of differences and that Doyle Brothers intended, when the purchases or sales were made, that they should be so settled, and that these transactions were included in this note sued upon, perhaps the intent of Cronin or Cronin Brothers that the trades should be so settled could be shown by evi-

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dence of this kind. But all these elements are absent from the proof in this case. This proof was of transactions with which Doyle Brothers were not connected and of which they were not shown to have had any knowledge. As the record stands, this proof was clearly incompetent. It presented an immaterial issue. It was calculated to mislead the jury. Appellant could not be expected to anticipate and be prepared to meet that case. If it was competent, appellant would have had a right to go into the dealings of Cronin or Cronin Brothers with all those Chicago firms and to show that the profits or losses were not so settled and that the parties did not so intend when the trades were made, and this would have been trying a case not before the court. Appellee called Abel D. Osman, who testified, over objections by appellant, that from 1900 to 1906, he was a member of the Board of Trade of Chicago and associated with five commission houses named, and that Cronin dealt with them about 1901 and bought and sold grain on margins and the trades were settled by the payment of differences. Doyle Brothers were not named by him nor was it shown that they knew anything about any of said dealings. For the reasons already stated, this evidence was incompetent and misleading. It was also too remote.

Appellee called James B. McCann, an undertaker, who testified over objections by appellant, to a conversation he heard prior to 1903 between Daniel J. Cronin and one of the Doyle Brothers, which seems to us too remote and not shown to have any relation whatever with the dealings, if any, included in this note. He was also permitted to say that he did not know of any dealings between Cronin and Doyle Brothers except in the buying and selling of grain, and he was allowed to state how the deals were settled by the payment of differences although he did not show that he knew that of his own knowledge or from any information obtained from Doyle Brothers. All of this was incompe-

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tent. He was also permitted to testify, over objection, that he thought he was familiar enough with Cronin's affairs to know if Cronin had any other deals with Doyle Brothers. This opinion that he thought, if there had been other deals between Cronin and Doyle Brothers, he would have known of it was incompetent. He should have stated what his relations with Cronin were and what facts placed him in a position to know of Cronin's dealings with Doyle Brothers, and it would then have been competent for him to testify that he did not know of any such dealings in relation to buying and selling grain except such as were settled by the payment of differences, and it should have been left to the jury to decide whether or not he was sufficiently familiar with Cronin's affairs to have known if there had been other dealings. He was permitted to decide that which should have been left to the jury. *Illinois Cent. R. Co. v. People*, 143 Ill. 434; *Hellyer v. People*, 186 Ill. 550; *Illinois Cent. R. Co. v. Smith*, 208 Ill. 608; *Kellyville Coal Co. v. Strine*, 217 Ill. 516; *Yarber v. Chicago & A. Ry. Co.*, 235 Ill. 589; *Springfield & N. E. Traction Co. v. Warrick*, 249 Ill. 470; *Hoffman v. Ernest Tossetti Brewing Co.*, 257 Ill. 185.

Daniel G. Cronin testified in behalf of the estate that he was the executor of the estate; that he was employed in the store of Thomas M. Cronin and succeeded him in the hardware business; that he found among his uncle's papers a statement from Doyle Brothers, which he produced, dated January 25, 1906, relating to transactions on and before that date. He testified that the deals of his uncle with Doyle Brothers in the summer of 1906 amounted to several thousand bushels and that he gained that information from said statement which, of course, was impossible. He was allowed to tell of various telephone conversations that his uncle had with some one whom he understood to be Doyle Brothers. The question of the competency or incompetency of conversations over a telephone has

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been discussed by the Supreme Court of this state in *Miles v. Andrews*, 153 Ill. 262; *Fitzgerald v. Benner*, 219 Ill. 485; and *Godair v. Ham Nat. Bank*, 225 Ill. 572. The same subject has been treated by this court in *Rock Island & P. Ry. Co. v. Potter*, 36 Ill. App. 590; *Snively v. Colburn*, 78 Ill. App. 93; *Galt v. Woliver*, 103 Ill. App. 71; *Rogers Grain Co. v. Tanton*, 136 Ill. App. 533; *Pumphrey v. Giggey*, 150 Ill. App. 473; *Wicks v. Wheeler*, 157 Ill. App. 578; and *Tripp v. Rockford Elec. Co.*, 186 Ill. App. 379. We also call attention to the views expressed by the Appellate Court for the first district in *Rueckheim Brothers v. Servis Ice Cream & Candy Co.*, 146 Ill. App. 607, and *Gallagher v. Singer Sewing Machine Co.*, 177 Ill. App. 198. There are some Appellate Court decisions in this State not in harmony with the foregoing, but we must regard them as overruled. It must be considered as established for this State that, if a person places himself in connection with a telephone system through an instrument in his office, he invites communications in relation to his business over such telephone, and that conversations so held are admissible in evidence wherever a personal interview by a customer with an unknown clerk in an ordinary shop would be admissible in relation to the business there carried on, and this without an identification of the voice at the telephone. If the witness had testified that Doyle Brothers had a telephone and its number, that he heard his uncle call that number and get it, and heard any particular conversation following by his uncle with some unknown person purporting to answer the telephone and concerning business dealings between his uncle and Doyle Brothers, he would have been competent to testify to so much of the conversation as he heard, and if he could not give the exact words of the conversation, but remembered the substance, he would be permitted to testify to that. This witness did not testify that Doyle Brothers had a telephone, that he



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knew its number or that he heard his uncle call for that number. All that he testified was that he assumed his uncle was talking with some one in the office of Doyle Brothers. For all that his testimony shows, it may have been with some one of the commission houses named by the witnesses Blasingham and Osman. He did not state the conversation he heard. He did not state that he was unable to recollect the words. He did not separate one conversation from another. He merely undertook to give his opinion of the general result of numerous conversations which he heard. We are of opinion that this evidence as given was incompetent. With this evidence excluded there is practically nothing in this record to show that this note was given in a settlement of differences growing out of gambling in grain.

The judgment is therefore reversed and the cause remanded.

*Reversed and remanded.*

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**Patrick Moran, Appellee, v. Florence A. Grim,  
Appellant.**

**Gen. No. 6,086. (Not to be reported in full.)**

Appeal from the Circuit Court of Grundy county; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed October 20, 1915.

### **Statement of the Case.**

Action by Patrick Moran, plaintiff, against Florence A. Grim, defendant, to recover for the breach of a real estate contract. From a verdict and judgment for plaintiff for \$105, defendant appeals.

By the contract which was in writing, plaintiff was to convey to defendant by warranty deed, free of all



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incumbrance, certain real estate and was to pay her \$250, and defendant was to convey to plaintiff by warranty deed, free of all incumbrance, certain other real estate, and the contract was to be carried into effect on February 15, 1914. Plaintiff brought suit before that date. It did not appear that he tendered to defendant a warranty deed or \$250, nor that he had that sum ready to pay to her.

JOHN G. PETTEYS, for appellant.

FRANK L. FLOOD, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

### Abstract of the Decision.

1. **CONTRACTS, § 339\***—*when action for breach of contract for exchange of realty not maintainable.* An action cannot be maintained before time for plaintiff's performance to recover for the breach of a contract to exchange realty, where it does not appear that plaintiff offered or was ready to perform his part nor that he was excused from performance by the language and conduct of the other party acting personally or through an agent.

2. **CONTRACTS, § 390\***—*when excuse from performance a question for jury.* In an action for the breach of a contract for the exchange of realty, brought before the time plaintiff was to have performed his part of the contract, where there was no proof of any tender or readiness of performance by plaintiff, the question whether performance by him had been excused by defendant's language or conduct is for the jury.

3. **DAMAGES, § 56\***—*what proper measure of damages in action for breach of contract.* In an action to recover for the breach of a contract for the exchange of realty, the measure of damages is the excess in value, at the time of the breach, of the property which plaintiff was to receive over that which he was to convey.

4. **DAMAGES, § 200\***—*when instruction as to measure of damages for breach improper.* In an action to recover for the breach of a contract for the exchange of realty, where there is no proof from which the jury can estimate the excess in value, at the time of the breach, of the property which plaintiff was to receive over the

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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property which he was to convey, it is error to authorize the jury, if they find for plaintiff, to assess such damages as they believe from the evidence plaintiff had sustained.

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### **Olive Moore, Appellee, v. George Wingerter, Appellant.**

**Gen. No. 6,089. (Not to be reported in full.)**

Appeal from the Circuit Court of Kankakee county; the Hon. ARTHUR W. DESELM, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.

#### **Statement of the Case.**

Action by Olive Moore, plaintiff, against George Wingerter, defendant, under section 9 of the Dramshop Act (J. & A. ¶ 4609) to recover damages for injury to her means of support and property by the sale and gift of intoxicating liquor to her husband, George Moore, which in the first count of the declaration was alleged to have caused his intoxication and in the second and third counts to have caused his habitual intoxication, which intoxication it was alleged caused great injury to her means of support and to her personal property. The court instructed the jury not to allow anything for injury to her person and that element is not in the case. There was a verdict and a judgment for plaintiff for five hundred dollars and defendant appeals.

The suit was begun June 4, 1913, and the inquiry was limited to the five years next preceding that date.

Plaintiff and defendant introduced evidence showing that plaintiff's husband was an habitual drunkard during all of said five years. Plaintiff proved without contradiction that a part of his intoxication was produced by wine which he bought either of defendant or of some of his children at defendant's home, and

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which said husband paid for. Defendant contended that only five such sales were proved in the five years. It was proved that during the first nine months of said five years he was drunk at least twelve times, or about once every three weeks, upon defendant's wine, and that these drunken spells lasted from three days to a week each, during all of which time he was entirely incapacitated for work. There was proof that at later times he was frequently intoxicated on wine of appellant. On cross-examination of the witnesses by whom this was proved, their statement that the husband told them he got the wine from appellant was excluded, but two of these witnesses also testified that they saw the wine which he had and upon which he became intoxicated from time to time, and that they knew defendant's wine from other wine and that this was defendant's wine. There was no contradiction of any of this evidence.

There was proof of the extreme poverty of plaintiff and her husband and of his failure to supply her most ordinary wants, and that his habitual drunkenness was the cause thereof. The evidence showed that when any money was earned on the land they worked, it was because plaintiff and her minor children worked in the fields. Married daughters furnished the clothing for herself and her minor children. Defendant was permitted to prove that others contributed to the habitual intoxication of George Moore; that he was seen lying drunk on the river bank in Momence with whisky bottles in his pocket; that he was seen drinking whisky in saloons; but the court did not permit proof of the names of the saloon keepers. There was evidence that plaintiff was present in a buggy or wagon perhaps three times when her husband bought this wine at defendant's farm and did not protest then against it. It was also shown that she took steps to have appellant notified by a lawyer not to sell liquor

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to her husband, but she was unable to show that the notice had in fact been given.

Complaint was made of the ninth instruction, given for plaintiff, which after submitting to the jury the question whether Moore during said five years became an habitual drunkard and whether within said five years appellant sold and delivered him intoxicating liquor, and whether he drank the same and whether the drinking thereof contributed to his becoming an habitual drunkard, and whether by reason of such habitual drunkenness the plaintiff was injured in her means of support, then told the jury that if they further believed from the evidence that during said period other persons sold and delivered intoxicating liquors to Moore and that he drank the same and that the drinking thereof contributed to his becoming an habitual drunkard, yet under the law appellant would be liable for the acts of all other persons who contributed to such habitual intoxication by selling and delivering intoxicating liquors to Moore.

The court refused four instructions requested by defendant. The first was to the effect that if Moore became intoxicated by intoxicating liquors obtained from others and by reason thereof plaintiff was injured in person, property or means of support, and if defendant sold intoxicating liquors to Moore and he thereby became intoxicated, then before defendant could recover, she must prove that the intoxication caused by defendant contributed to the injury to her person, property or means of support. The second refused instruction was on the basis that the wine sold by defendant was not intoxicating and that Moore mixed said wine with other liquors and thereby became intoxicated. The third refused instruction was intended to cause the jury to consider the proof that Moore became intoxicated by liquors sold him by others in mitigation of damages. The fourth refused instruction assumed that there was evidence that plaintiff

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purchased from defendant intoxicating liquors for her husband and that such fact might be considered in mitigation of damages.

H. K. & H. H. WHEELER and W. H. SAVARY, for appellant.

W. R. HUNTER and WALTER C. SCHNEIDER, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

### Abstract of the Decision.

1. INTOXICATING LIQUORS, § 244\*—*when evidence justifies instruction as to exemplary damages.* Evidence in an action by a wife to recover under section 9 of the Dramshop Act (J. & A. ¶ 4609), examined and held to justify an instruction given for plaintiff submitting the question of exemplary damages to the jury.

2. INTOXICATING LIQUORS, § 214\*—*when evidence as to other sales properly excluded.* In an action by a wife under section 9 of the Dramshop Act (J. & A. ¶ 4609), it is proper to exclude evidence as to the names of other saloon keepers who had sold intoxicating liquors to plaintiff's husband.

3. INTOXICATING LIQUORS, § 216\*—*when evidence of sales by others not a defense.* In an action by a wife under section 9 of the Dramshop Act (J. & A. ¶ 4609), to recover for sales to plaintiff's husband, it is no defense that others had sold intoxicating liquors to the husband and caused or contributed to his intoxication.

4. INTOXICATING LIQUORS, § 216\*—*when evidence of habitual drunkenness not a defense.* In an action by a wife under section 9 of the Dramshop Act (J. & A. ¶ 4609), it is no defense that plaintiff's husband, for the sales to whom of intoxicating liquors the action is brought, was an habitual drunkard before the five years covered by the suit.

5. INTOXICATING LIQUORS, § 181\*—*when presence of plaintiff at time of sale not a defense.* In an action by a wife under section 9 of the Dramshop Act (J. & A. ¶ 4609), to recover for sales of intoxicants to her husband, it is not a defense that she was present at times when such sales were made to the husband and did not protest then against it, where evidence shows that she had theretofore protested without avail, was present unwillingly when they were

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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made and had taken steps to notify defendant not to sell liquor to the husband.

6. INTOXICATING LIQUORS, § 249\*—*when instruction as to sales by others proper.* In an action by a wife under section 9 of the Dramshop Act (J. & A. ¶ 4609), to recover damages for injury to her means of support and property by the sale and gift of intoxicating liquor to her husband, an instruction given at plaintiff's request which after submitting to the jury the question whether the husband during the five years covered by the action became an habitual drunkard, and whether within such time defendant sold and delivered to him intoxicating liquor, and whether the husband drank the liquor, and whether the drinking thereof contributed to his becoming an habitual drunkard, and whether by reason of such habitual drunkenness the plaintiff was injured in her means of support, then told the jury that if they further believed from the evidence that during the period other persons sold and delivered intoxicants to the husband and that he drank them and that the drinking thereof contributed to his becoming an habitual drunkard, yet under the law defendant would be liable for the acts of all other persons who contributed to such habitual intoxication by selling and delivering intoxicating liquors to the husband, is proper.

7. INTOXICATING LIQUORS, § 206\*—*when instruction as to burden of proof properly refused.* In an action by a wife under section 9 of the Dramshop Act (J. & A. ¶ 4609), to recover damages for injury to her means of support and property by the sale of intoxicating liquor to her husband, an instruction to the effect that if the husband became intoxicated by liquor obtained from others and by reason thereof plaintiff was injured in person, property or means of support, and if defendant sold intoxicating liquors to the husband and he thereby became intoxicated, then before plaintiff could recover she must prove that the intoxication caused by defendant contributed to the injury to her person, property or means of support, is properly refused as placing upon her the burden of proving an injury from the use of defendant's liquor separate from that produced from the liquor sold the husband by others.

8. INTOXICATING LIQUORS, § 249\*—*when instruction not based on evidence properly refused.* In an action by a wife under section 9 of the Dramshop Act (J. & A. ¶ 4609), to recover damages for injuries to her means of support and property by the sale of intoxicating liquor to her husband, an instruction on the basis that the liquor sold by defendant was not intoxicating and that defendant mixed it with other liquors and thereby became intoxicated is properly refused where there was no proof on which to base such an instruction.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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9. INTOXICATING LIQUORS, § 246\*—*when instruction as to mitigation of damages properly refused.* In an action by a wife under section 9 of the Dramshop Act (J. & A. § 4609), to recover damages for injury to her means of support and property by the sale of intoxicating liquors to her husband, an instruction intended to cause the jury to consider the proof that the husband became intoxicated by liquors sold him by others in mitigation of damages is properly refused.

10. INTOXICATING LIQUORS, § 246\*—*when instruction as to mitigation of damages properly refused.* In an action by a wife under section 9 of the Dramshop Act (J. & A. § 4609), to recover damages for injury to her means of support and property by the sale of intoxicating liquor to her husband, an instruction which assumes that there was evidence that plaintiff purchased from defendant intoxicating liquors for her husband and that such fact might be considered in mitigation of damages is properly refused where there was no evidence upon which to base it.

11. INTOXICATING LIQUORS, § 249\*—*when ruling of court on instructions not ground for reversal.* Rulings on instructions in an action by a wife under section 9 of the Dramshop Act (J. & A. § 4609), examined and *held* not ground for reversal.

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**James Brack, Appellee, v. B. F. Berry Coal Company,  
Appellant.**

**Gen. No. 6,091. (Not to be reported in full.)**

Appeal from the Circuit Court of Putnam county; the Hon. THEODORE N. GREEN; Judge, presiding. Heard in this court at the April term; 1915. Affirmed. Opinion filed October 20, 1915.

**Statement of the Case.**

Action: by James Brack, plaintiff, against B. F. Berry Coal Company, defendant, to recover for injuries to plaintiff by the fall of a rock in the roof of a mine of defendant while plaintiff was at work underneath said rock, as a servant of defendant. This is an appeal from the second trial of this case. On the

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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Brack v. B. F. Berry Coal Co., 196 Ill. App. 192.

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first trial, plaintiff had verdict and judgment for \$15,000 which was reversed in *Brack v. B. F. Berry Coal Co.*, 187 Ill. App. 609, because an instruction for plaintiff was not sufficiently modified, and because an instruction requested by defendant was improperly refused, and because of a lack of certain necessary evidence. On the present trial plaintiff had verdict and judgment for \$14,000, from which defendant appeals.

The substance of the charge in the declaration was that the roof of the room in which plaintiff was mining coal was in an unsafe and dangerous condition; that plaintiff desired to use certain props, caps and timber to secure said roof; that defendant wilfully failed to provide a supply of such props, etc., though proper demand as provided by law had been made therefor; and that because of such noncompliance with the provisions of the law, the rock fell upon and injured plaintiff.

For defendant it was contended that plaintiff had plenty of suitable props at the time he was injured and failed to use them, and that as defendant had furnished, and there were in and near his room, plenty of props for his use, the charge was not sustained; and also that the damages are excessive. Complaint was also made that the court erroneously refused to admit in evidence rule 10 offered by defendant and gave an erroneous instruction requested by plaintiff.

There was in the record evidence that the only props in that vicinity accessible to plaintiff before his injury were props that had been broken or were crooked and unfit to be used, and that defendant had failed to supply the needed props as demanded. Defendant contended that as plaintiff supposed the stone above him in the roof where he was at work would not fall, and that it was safe for him to work under it, therefore, if suitable props had been supplied, he would not have used them, and therefore his injury was not due to the failure to supply props. The proof showed that



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the rock above had slightly slipped and plaintiff knew it before he went to work under it that morning, and that the distance for which it was unsupported was such that plaintiff and his buddy that morning wished to put props underneath it to prevent any danger of its falling, and that they did not put props there before working because they had none.

The court permitted proof that rules had been posted by defendant and permitted the rules to be produced in the court room, but refused to permit rule 10 to be read in evidence to the jury.

MCDUGALL, CHAPMAN & BAYNE, for appellant; MASTIN & SHERLOCK and GEORGE W. HUNT, of counsel.

DUNCAN & O'CONOR, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

### Abstract of the Decision.

1. MINES AND MINERALS, § 76\*—*when evidence sufficient to show failure to supply props.* Evidence in an action by a miner to recover for injuries by the fall of rock in the roof of a mine of defendant while plaintiff was working in the mine in the employ of defendant, examined and *held* to show that there was a clear preponderance of evidence that the only props in the vicinity accessible to plaintiff were broken or crooked and unfit for use, and that defendant had failed to supply the needed props as demanded in accordance with the requirements of Hurd's Rev. St., ch. 93, art. 20.

2. MINES AND MINERALS, § 176\*—*when evidence sufficient to support verdict for plaintiff.* Evidence in an action to recover for injuries to an employee by the fall of rock in a mine in which he was working, examined and *held* sufficient to support a verdict for plaintiff.

3. MINES AND MINERALS, § 168\*—*when evidence of rule properly excluded.* In an action by a miner to recover for injuries by the fall of rock in the mine in which he was employed, evidence of a rule so framed as to permit the employer to wilfully violate the statutory regulations as to mines and yet give him a defense against

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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any miner injured by such wilful violation is properly excluded, such rule being void as against public policy.

4. **APPEAL AND ERROR, § 1561\***—*when omission in instruction cured by other instructions.* The fact that an element in a case is stated in brief form in an instruction is not ground for reversal where the element was fully stated in other instructions given at the request of the same party.

5. **MINES AND MINERALS, § 195\***—*when damages not excessive.* In an action by a miner to recover for injuries received by the fall of rock in a mine where the evidence shows that he was seriously injured; that his lower limbs and the lower part of his body were completely paralyzed; that he had no control over his bowels nor his bladder; that he suffered from great pain; that he was under constant treatment for a very long time; that he is a helpless cripple and permanently incapacitated for work and that at the time of the injury he was twenty years old and a strong healthy man, it cannot be said that \$14,000 is an excessive award even though the maximum amount recoverable for his death would have been \$10,000.

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**Henry Jennings, Appellant, v. County of Peoria,  
Appellee.**

**Gen. No. 6,096.**

1. **COUNTIES, § 67\***—*when action not maintainable for negligence of servants.* A private action will not lie against a county for injuries occasioned by the negligence of its servants or officers in the performance or nonperformance of their duties, or in the performance of their duties in a negligent manner in the absence of express statutory authority.

2. **MUNICIPAL CORPORATIONS, § 948\***—*when not liable for negligence of servants.* The same principle applies as to the nonliability of a municipal corporation for the negligence of its servants or officers in the performance or nonperformance of their duties, or in the performance of their duties in a negligent manner, as applies in the case of counties when the municipality is performing those acts which it is empowered to do in its public capacity and in the discharge of duties imposed for the general welfare.

3. **PLEADING, § 184\***—*what the proper office of demurrer.* It is not the office of demurrer to allege facts, but it simply concerns such facts as are stated in the pleading demurred to.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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4. PLEADING, § 14\*—*when demurrable as stating conclusion.* In an action against a county to recover for injuries caused by an automobile alleged to have belonged to the county and to have been negligently operated by one whom it had placed in custody and control of the machine, a declaration which nowhere states for what purpose defendant purchased and used the automobile, but simply alleges that it was not being operated by the defendant in the performance of any duty imposed upon it by law, is insufficient as stating a conclusion and not a fact.

5. PLEADING, § 146\*—*when allegations of fact in demurrer disregarded.* Allegations of fact contained in a demurrer will be disregarded.

Appeal from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.

WALTER H. KIRK, for appellant.

C. E. McNEMAR and CLARENCE D. MURPHY, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

After dismissing the other defendants, Henry Jennings filed a second amended declaration, hereinafter called the declaration, against the County of Peoria. The county filed a general and special demurrer thereto, which was sustained. Jennings elected to abide by his said declaration and there was a judgment in bar against plaintiff, and he appeals.

The declaration alleged that the county possessed an automobile, which it placed in the custody and control of one Minor, and authorized him to procure for it at the county's expense all necessary gasoline and other supplies and accessories and to have all necessary repairs made from time to time and to engage the services of a competent person to operate said automobile for the county; that Minor received from the county (acting through its board of supervisors)

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the custody and operation of said automoible for the county and agreed with the county to purchase at the expense of the county all necessary gasoline and other accessories and to have all necessary repairs made thereon and to engage competent persons to operate it; that Minor engaged one Sterns to operate said automobile for the county; that on a date named the automobile had been repaired at a factory and was being driven by Sterns, under the direction of Minor, from the factory to the courthouse; that appellee was lawfully crossing a street in the City of Peoria with due care for his own safety, when he was struck and injured by said automobile. The first count charged the reckless and negligent running of the automobile; the second, that it was run at a high and dangerous rate of speed; the third, failure to give appellee warning of its approach; and the fourth, that it was run at a speed which violated the statute. Each count alleged that said automobile was not then being run or operated by the county in the performance of any duty imposed upon it by law.

It was well established at an early day that in this State a private action will not lie against a county for injuries occasioned by the negligence of its servants or officers in the performance or nonperformance of their duty, or in the performance of their duty in a negligent manner, unless expressly so provided by statute. This rule was illustrated by a review of many authorities in *Hollenbeck v. Winnebago County*, 95 Ill. 148, where the principle in question is very fully stated. The same principle had previously been stated in many cases, including *Hedges v. Madison County*, 6 Ill. (1 Gilm.) 567; *Town of Waltham v. Kemper*, 55 Ill. 346; *Bussell v. Town of Steuben*, 57 Ill. 35; *White v. Bond County*, 58 Ill. 297; and *Symonds v. Board Sup'rs, Clay County*, 71 Ill. 355.

The Constitution of 1870 made a county a municipal corporation, and some of the cases above cited were

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decided since that Constitution took effect. The same principle applies to a municipal corporation when it is performing those acts which it is empowered to do in its public capacity, and in the discharge of duties imposed for the general welfare, such as the exercise of the police power, and the like. *Culver v. City of Streator*, 130 Ill. 238; *Elmore v. Drainage Com'rs*, 135 Ill. 269; *City of Chicago v. Williams*, 182 Ill. 135; *City of Chicago v. Selz, Schwab & Co.*, 202 Ill. 545; *Tollefson v. City of Ottawa*, 228 Ill. 134; *Evans v. City of Kankakee*, 231 Ill. 223; and *Miner v. State Board of Agriculture*, 259 Ill. 549. This subject is discussed in the article on "Counties" in the 31st paragraph thereof, in 7 R. C. L. 957. Appellant seeks to apply the principles laid down in *Gathman v. City of Chicago*, 236 Ill. 9; *Lehigh Valley Transportation Co. v. City of Chicago*, 237 Ill. 581; and *Johnston v. City of Chicago*, 258 Ill. 494, 4 N. C. C. A. 40. Those cases hold that municipalities incur no liability for the negligence of their officers or employees, where they are exercising governmental functions or judicial, discretionary or legislative authority, conferred by their charters, or discharging a duty imposed solely for the benefit of the public, but are liable where they are acting ministerially; and the three cases last cited are not out of harmony with the general rule above stated.

This demurrer referred to Minor as if he were the sheriff of Peoria county. A demurrer concerns such facts as are stated in the pleading demurred to. It is not the office of a demurrer to allege facts. *Wood v. Papendick*, 268 Ill. 383. The intimation that Minor was sheriff must therefore be disregarded though it may furnish an apt illustration. The declaration nowhere states for what purpose the county purchased and used this automobile. The allegation above stated, that it was not being operated by the defendant in the performance of any duty imposed upon it by law, is the statement of a conclusion and not of a fact. This

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is not proper pleading. Appellant should have stated the purpose for which the automobile was obtained and used, and the court could then have determined whether it was for a purpose which would make the county liable for the negligence of the man operating it or for a purpose which would not render the county liable for the negligence of the officer or employee. Suppose, in fact, this machine was purchased for the purpose of aiding the sheriff in performing his police duties, to enable him to speedily overtake fugitives from justice, or to reach speedily a mob or disorderly assembly in some distant part of the county. We presume it would be conceded that in such case the county would not be liable for the act of the driver of the automobile, any more than the city was for the act of the policeman in *Culver v. City of Streator, supra*. The declaration states a case against Sterns. Perhaps it states a case against Minor. It fails to state facts bringing it within that class of cases where a county is liable for the negligence of its officers and servants. The judgment is therefore affirmed.

*Affirmed.*

MR. JUSTICE NIEHAUS took no part.

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**The People of the State of Illinois ex rel. Nellie McGraham, Appellee, v. J. E. Armstrong et al., Appellants.**

**Gen. No. 6,102.**

1. PLEADING, § 190\*—*when matters of form not questioned by general demurrer.* On a petition for mandamus against the trustees of the policemen's fund of a city filed by the widow of a deceased policeman, to compel the payment by them to her of an amount claimed to be due from such fund, objections that the petition is defective in not alleging facts to show that an ordinance creating

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the office of policeman in such city was duly adopted by a vote of two-thirds of all the duly elected aldermen; that the allegation that the husband was duly appointed policeman is not sufficient; that it did not show that he was duly nominated and confirmed every two years after his original nomination and confirmation; that it did not allege the deduction from his salary of the amount of one per cent. per month nor that such amount was paid by him into the fund, relate to matters of form and not of substance, and cannot be reached by a general demurrer, but must be questioned by special demurrer.

2. **LIMITATION OF ACTIONS, § 12\***—*what limitation applicable to petition for mandamus to compel payment.* The ordinary statute of limitations is applicable to a petition by the widow of a policeman for mandamus to compel the payment of a pension claimed to be due from the fund created by the Police Pension Fund Act of 1909 (J. & A. ¶ 1875), and where the evidence shows that the policeman died on January 7, 1912, demand was made March 12, 1914, and the proceeding was instituted April 2, 1914, the proceeding is not barred.

3. **EQUITY, § 85\***—*when claim not barred by laches.* Where the act creating a police pension fund (J. & A. ¶ 1875), and the ordinance of a city enacted pursuant thereto contain a provision for pro rata payments to the beneficiaries when there are not sufficient funds on hand to pay the allowances, a delay of two years and three months in bringing suit to recover such pension cannot be held laches.

4. **MUNICIPAL CORPORATIONS, § 143\***—*when defense of insufficiency of fund to be interposed in answer.* On a petition for mandamus to compel the payment to a policeman's widow of a pension out of the fund created by the Police Pension Act of 1909 (J. & A. ¶ 1875), which act and the ordinance adopted pursuant thereto contain a provision for pro rata payments where the fund is insufficient to meet all allowances, the defense that such deficiency exists must be set up in the answer.

5. **MUNICIPAL CORPORATIONS, § 143\***—*when right to benefit of police pension fund accrues.* To entitle a policeman's widow to a pension under the Police Pension Fund Act of 1909 (J. & A. ¶ 1875), and an ordinance adopted pursuant thereto, it is not necessary that the husband's death shall not have occurred until ten years after the ordinance has been in force, but her right to such pension accrues even though he dies in less than two years after the ordinance goes into effect.

6. **MUNICIPAL CORPORATIONS, § 143\***—*when ten years' continuous service not essential to entitle to benefit of police pension fund.* The Police Pension Fund Act of 1909 (J. & A. ¶ 1875), does not require

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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that the ten years' service provided for therein shall have been ten continuous years' service.

7. MUNICIPAL CORPORATIONS, § 143\*—*when dependency not prerequisite to right of widow to benefits of police pension fund.* The pension provided for by the Police Pension Fund Act of 1909 (J. & A. § 1875), and an ordinance adopted pursuant thereto, is payable to the widow in any event, whether or not she was dependent upon the husband for support.

8. MUNICIPAL CORPORATIONS, § 143\*—*when subsequently appointed policemen entitled to benefits of pension fund.* The Police Pension Fund Act of 1909 (J. & A. § 1875), and an ordinance adopted pursuant thereto, do not restrict their application to policemen who were such at the time the ordinance went into effect, but include also those subsequently appointed.

9. MUNICIPAL CORPORATIONS, § 143\*—*when policeman acting as merchant policeman comes within the fund.* The fact that during a portion of his service a policeman acted as merchant policeman, receiving one-half of his pay from merchants of the city and the other half from the city does not prevent his widow from being entitled to the benefits of the fund provided for by the Pension Fund Act of 1909 (J. & A. § 1875), and an ordinance adopted pursuant thereto.

10. APPEAL AND ERROR, § 1712\*—*when points not argued in briefs waived.* A point not argued in appellant's briefs is waived by him.

Appeal from the Circuit Court of Winnebago county; the Hon. ARTHUR H. FROST, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.

E. P. LATHROP, ROBERT LATHROP and ROY H. BROWN, for appellants.

E. D. REYNOLDS, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Mrs. Nellie McGraham, the widow of a policeman, filed in the Circuit Court of Winnebago county a petition for a writ of mandamus against the trustees of the policemen's fund of the City of Rockford to command them to pay her \$1,040 from the pension fund. The trustees filed a general and special demurrer to said petition. Afterwards, by leave of court, they

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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withdrew said demurrer, and filed another general and special demurrer in which more grounds of special demurrer were alleged. The court overruled said demurrer and the respondents answered the petition. Thereafter, they withdrew that answer and elected to abide by their demurrer, and petitioner had judgment awarding a peremptory mandamus against said trustees, directing them to pay the petitioner, out of the funds in the hands of the treasurer of said trustees, \$1,040 in accordance with an ordinance of said city. The respondents appealed. Appellee contends that appellants, by answering after their demurrer had been overruled, abandoned their demurrer, and that the record was then the same as if no demurrer had been filed, and that as they did not refile a demurrer after withdrawing their answer, they had nothing before the court. Without passing upon the merits of this contention, we have decided to treat the case as if the ruling upon the demurrer was properly before this court.

This proceeding is under the Act of 1909 (J. & A. ¶ 1875) for the establishment of a police pension fund in cities, the title of which was amended in 1913. The last sentence of section 6 of said Act (J. & A. ¶ 1880) is as follows: "Whenever any member of a police force shall die after ten years' service therein and while still in the service of such city, village or town, leaving a widow or child or children under the age of sixteen years or dependent parent upon such policeman for their maintenance and support, then upon satisfactory proof of such facts made to it, said board shall order and direct that a pension equal to one-half of the salary of such policeman: *Provided, however,* that the sum shall not be more than \$600.00 per year, shall be paid to such widow, or, if there be no widow, then to such child or children until they shall be sixteen years of age, or if there be no widow, or child under the age of sixteen years, then to such parent

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or parents as is or are dependent upon such policeman for their support, said pension to cease upon the marriage, as is heretofore provided." The petition filed by Mrs. McGraham alleged that on May 6, 1895, J. T. McGraham was duly appointed assistant marshal and policeman in and for the City of Rockford, and thereafter, on May 15, 1895, the mayor and city clerk of said city duly commissioned said McGraham as such assistant marshal and policeman for such city; that McGraham continued in such employment as a policeman in the City of Rockford, and performed all his duties as such police officer from said date until January 7, 1912, excepting a period from January 7, 1907, to November 1, 1910, during which last mentioned period McGraham was actively employed as a merchant policeman in and for the City of Rockford, and received for such services as merchant policeman, \$40 per month from the City of Rockford, payable each and every month, and a like sum from individuals and persons interested in the maintenance and support of such service; that the total time of service of said McGraham as such policeman and merchant policeman in and for the City of Rockford was sixteen years and eighteen months; that McGraham, while a member of such regular police force in the City of Rockford, died January 7, 1912; that at the time of his death he had served the City of Rockford as such regular police officer for more than ten years, and was at the time of his death in the active service and employment of said city, and was receiving for his services as such regular policeman \$80 per month, payable each month; that petitioner and said McGraham were lawfully married on November 15, 1891, and lived together as husband and wife in said city until he died, and at his death petitioner was his lawful wife, and there survived him petitioner as his widow, and two children, each then under the age of sixteen years. The petition further set out in full an ordinance alleged to have been passed

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by the City Council of the City of Rockford on April 4, 1910, and which became effective on April 7, 1910. Said ordinance is substantially word for word the same as the legislative act above referred to. The petition further alleged that at the date of the death of said McGraham and at the date of the filing of said petition, said ordinance was in full force and effect in the City of Rockford; that, in accordance with the laws of the State of Illinois and the ordinances of the City of Rockford, the petitioner was on the date of the death of said McGraham, and since said date, and at the time of filing said petition is entitled to receive from such pension fund one-half the salary paid to such policeman, not to exceed \$600 per year; that the petitioner is the widow of said policeman and has not remarried; that there is now in the hands of the treasurer of the said board of trustees of the police pension fund \$4,000, accumulated and acquired from the various sources defined in said ordinance for the purposes set forth in said ordinance; that petitioner is entitled to receive the benefits under said ordinance during each and every month; and that by the terms thereof she is entitled to receive twelve instalments each year of \$40 each, but the same has never been paid by said trustees nor any part thereof, and there is now due her from said fund \$1,040; that she has made demand in writing upon said board of trustees for the payment of said money, a copy of which demand is attached to the petition and made a part thereof; that such demand for payment has been wholly refused by said board and said board unlawfully withholds such payment contrary to the statute and said ordinances.

Several objections to said petition which are strongly argued by appellants are not raised upon this record. It is argued by appellant that the petition is fatally defective in not alleging facts to show that an ordinance creating the office of policeman in the City of Rockford was duly adopted by a vote of

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two-thirds of all the duly elected aldermen; that the allegation that McGraham was duly appointed assistant marshal and policeman for the City of Rockford is not sufficient; that the petition should not only have shown that McGraham was duly nominated and duly confirmed to that office originally, but should also have shown that he was duly nominated and confirmed every two years thereafter; and that the petition is fatally defective in not alleging that one per cent. per month of McGraham's salary was either deducted for said police pension fund or was paid by McGraham into that fund. Each of these objections relates to a matter of form and not to a matter of substance. The matter of substance is that McGraham served as a member of the police force by lawful authority for the time indicated. The details of the method by which he acquired and held that position are pure matters of form. Since the enactment of certain statutes in the reigns of Elizabeth and Anne, a general demurrer to a pleading will not reach matters of form, but only matters of substance; and matters of form must be questioned by a special demurrer particularly pointing out the omission or defect in the matter of form. 1 Chitty's Pl., 663, 664; Heard's Civil Pleading, 106, 107. The original demurrer assigned two special causes, namely: that McGraham had not served ten consecutive years when he died and that the petition did not show a demand for payment before March 12, 1914. The first of these objections will be considered in passing upon the second special demurrer. As to the second of said causes alleged in the first special demurrer, it is sufficient to say that McGraham died on January 7, 1912, and that the ordinary statute of limitations applies to this action of mandamus, and that a demand on March 12, 1914, and the institution of this suit on April 2, 1914, were each within the statute. Section 13 of the statute and section 13 of the ordinance each provides for cases where there are not sufficient moneys in the

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police pension fund to pay the allowances of such board to the beneficiaries, and that in such case they shall be paid pro rata from said fund. With that provision in force, no harm could come to the fund by delay in instituting suit, and the delay here referred to cannot be treated as laches. The petition averred that the fund on hand amounted to \$4,000. If, by reason of other beneficiaries having a lawful claim upon the fund, the full amount due Mrs. McGraham by the terms of the statute and the ordinance could not be paid without depriving other beneficiaries of some part of that which is also due to them, that defense, being particularly within the knowledge of the respondents, should be interposed by answer. The record filed here does not contain the answer which was filed and which was withdrawn.

The first special cause assigned under the second demurrer was that the petition showed that McGraham had not duly served as a duly commissioned policeman or member of the regularly constituted police force in the City of Rockford for the ten consecutive years last prior to his death; and the fourth was that the petition did not show that McGraham had served as a member of the police force for ten years after the ordinance took effect. The ordinance went into effect on April 7, 1910, and the fund began to be accumulated immediately thereafter from nine different sources specified in the ordinance, one of the sources being the withholding each month of a certain portion of each policeman's salary. Under the construction here contended for, there could be no payment of benefits out of said fund until the ordinance had been in force ten years, and the family of any policeman who contributed by compulsion thereto and died before the expiration of the ten years would have no right to any benefit from said fund. Such a construction is not reasonable, and we are convinced from a reading of the entire statute and of the entire ordinance that no

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such result was intended. We also conclude the services need not be continuous (*Hess v. Board of Trustees of City of Bloomington*, 188 Ill. App. 8), though we hold that it is here alleged to have been continuous. The second special cause assigned under the second demurrer is that the petition does not show that Mrs. McGraham was dependent upon her husband for support. While there is a slight confusion in one or two places in the statute and in the ordinance where the word "dependent" is used, yet it is clear to us from a reading of said act, and especially sections 3 and 6, that the pension is payable in any event to the widow, and if there be no widow, then to such child or children as shall be under the age of 16 years, or if there be none such, then to such parent or parents as is or are dependent upon such policeman for their support, and that the word "dependent" applies only to the parent or parents. The third special cause assigned under the second demurrer is that the petition does not show that McGraham was a member of the regularly constituted police force in the City of Rockford when the ordinance took effect. There is nothing in this statute or in this ordinance to indicate that the fund was so established as only to be for the benefit of those who were policemen when the ordinance was adopted. No such meaning can be attributed to the act or the ordinance. This police pension fund may remain in force for very many years, and all of those who were in service at the time it was adopted may be dead long before the fund ceases. A statute which would take from the pay of subsequent policemen a sum of money each month for this fund, but which would debar all those who shall contribute to it from sharing in the fund except those who were in office when the ordinance was adopted, would be invalid. Indeed, section 3 of the act and section 3 of the ordinance each expressly shows that the fund is to be for the benefit not only of those who were members of the

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force when the ordinance was adopted, but of those who thereafter become members of the force. Under that section, a policeman must have served twenty years, but the portion of section 6 above cited applies to policemen who have served ten years. Moreover, the petition avers that at the time of his death McGraham had served the City of Rockford as such regular police officer for more than ten years. There was a period from January 7, 1907, to November 1, 1910, during which time he was actively employed as a merchant policeman in and for the City of Rockford and was paid one-half of his wages by the City of Rockford, and there is nothing to show or imply that his services as a merchant policeman made him any other than a policeman in the City of Rockford. It is obvious from the allegations of the petition that the services which he then performed were as a regular police officer in the employ of the City of Rockford, and under the petition he had been a member of the police force for more than ten years. The fifth special cause assigned under the second demurrer is that the petition does not show that satisfactory proof was made to the trustees of McGraham's death and that he left a widow and children dependent upon him for support, and that he was a member of the police force when he died and left a widow and children. This point is not argued in appellant's briefs, and is therefore abandoned and waived, as held in *Banfill v. Twyman*, 172 Ill. 123; *Harrow v. Grogan*, 219 Ill. 288; *Bower v. Livingston*, 251 Ill. 330; *Biewer v. Mueller*, 254 Ill. 315, and in many other cases. These are all the grounds of special demurrer assigned, and in our judgment none of them is well taken. We consider the petition sufficient in substance, and the judgment is therefore affirmed.

*Affirmed.*



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Danzeiser v. Clarke, 196 Ill. App. 209.

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**Gus Danzeiser, Appellee, v. Robert D. Clarke,  
Appellant.**

**Gen. No. 6,105. (Not to be reported in full.)**

Appeal from the Circuit Court of Peoria county; the Hon. N. E. WORTHINGTON, Judge, presiding. Heard in this court at the April term, 1915. Reversed with finding of facts. Opinion filed October 20, 1915.

**Statement of the Case.**

Action by Gus Danzeiser, plaintiff, against Robert D. Clarke, defendant. Plaintiff had judgment by default for \$200 before a justice of the peace. On appeal by defendant to the Circuit Court, plaintiff had verdict and judgment for \$150, from which defendant appeals.

The evidence showed that plaintiff obtained a patent on a railroad switch frog and thereafter made a written contract with defendant, signed by both parties, constituting defendant his attorney in fact to assign, sell and deliver said patent to an Illinois corporation. The rest of the contract is mainly as follows: "In consideration of the confidence reposed in me and in consideration of the advance in money which I hereby bind myself to make, and for that which I have already made, I agree with said Gus Danzeiser to at once furnish all the necessary capital to construct, deliver and install, in different parts of the United States, at least thirty (30) of said devices and to furnish the necessary expenses to said Gus Danzeiser to supervise and direct the installation of the same, and if a demonstration and test of the said thirty devices so made and installed show the practicability of such device then and in that event I will organize a corporation with sufficient capital to manufacture and sell and dispose of said devices in such quantities as the market therefor might demand.

"In the organization of such corporation I bind myself that the stock thereof shall be fully paid up, and



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that said Gus Danzeiser shall receive forty-five (45%) per cent. of same, the remaining fifty-five (55%) per cent. thereof to belong to myself and the said John H. Carroll, or our several assigns.

“I further bind myself as aforesaid to said Gus Danzeiser to have such corporation enter into a contract with him by the terms of which he shall receive all necessary expenses for himself in the supervising and directing the manufacture and installation of said devices, and as an additional compensation shall receive from said corporation annually, a sum equal to ten (10%) per cent. of the net profits of said corporation after organized.”

It appeared that the said thirty devices were manufactured in Milwaukee and shipped to Peoria. Defendant paid plaintiff \$20 for his expenses to go to Milwaukee and superintend their construction and see that they were properly made. The evidence also showed that by the time the freight had been paid and the devices delivered in Peoria, defendant had expended about \$600 thereon. Thereafter plaintiff made trips to various cities, and incurred various expenses for railroad fare, hotel bills, cigars and other matters, and ran up a bill of \$235.90, and deducting therefrom the \$20 he had received from defendant for a trip to Milwaukee to see that the devices were properly manufactured, his remaining expenses amounted to \$215.90. He claimed that under the written contract above set out, defendant was liable to refund him that expense.

Plaintiff did not know how many days he spent in any of those places, what hotels he stopped at, what rates per day he paid nor any other item.

QUINN & QUINN and HEYL & McGRATH, for appellant; C. O. O'HERN and JOHN DOUGHERTY, of counsel.

CHARLES S. STUBBLES, for appellee; E. J. SLOUGH, of counsel.

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Weltz v. Connell, 186 Ill. App. 211.

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MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

### Abstract of the Decision.

CONTRACTS, § 387\*—*when evidence insufficient to support judgment for plaintiff.* The evidence in an action on a contract examined and held insufficient to show defendant liable.

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**Anna Weltz, Appellee, v. John R. Connell, Appellant.**

**Gen. No. 6,110. (Not to be reported in full.)**

Appeal from the Circuit Court of Carroll county; the Hon. JAMES S. BAUME, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915. *Certiorari* denied by Supreme Court (making opinion final).

### Statement of the Case.

Action by Anna Weltz, plaintiff, against John R. Connell, defendant.

The facts in this case are stated in *Weltz v. Connell*, 186 Ill. App. 336. That opinion, reversing and remanding the cause, was based upon the refusal of the court to give instruction No. 17, requested by appellant, which would have told the jury that, before the plaintiff could recover, she must prove by a preponderance of the evidence that misrepresentations relative to the land in question were made by the defendant, that such misrepresentations were false and known by the defendant to be false when made, that the plaintiff was deceived thereby, and that she had been injured because of them. This instruction was given upon the second trial, which also resulted in a verdict for the plaintiff below, followed by a judgment, from which the defendant below has taken this appeal.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Barton v. Coulson, 196 Ill. App. 212.

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B. K. WELSH and BREARTON & WALTER, for appellant.  
F. J. STRANSKY, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

### **Abstract of the Decision.**

1. **VENDOR AND PURCHASER, § 54\***—*when evidence sufficient to sustain verdict.* Evidence in an action for fraud and deceit in exchange of lands and for breach of warranty, examined and held to support a verdict for plaintiff.

2. **INSTRUCTIONS, § 18\***—*when misleading instruction properly refused.* An instruction which states a correct proposition of law is properly refused where giving it would tend to mislead the jury.

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### **James S. Barton, Appellee, v. Foster Coulson, Appellant.**

**Gen. No. 6,115.**

1. **JOINT ADVENTURE, § 8\***—*when action at law maintainable to recover proceeds of joint adventure.* Where the evidence shows that plaintiff and defendant bought a lot of cattle together and shipped them to another point and sold them there and the transaction resulted in a loss, and that the amount thereof had been ascertained between the parties and one had agreed to pay the other one-half the loss, an action at law may be maintained by the latter against the former to recover the amount so promised.

2. **JOINT ADVENTURE, § 8\***—*when statement showing gross and net proceeds and charges admissible.* Where, in an action to recover an amount claimed to be due from defendant to plaintiff on a joint adventure, plaintiff's evidence showed that he obtained a written statement showing the gross proceeds of the sale under such adventure, the charges incurred therein and the net proceeds; that he had bought the commodity at the price agreed upon between him and defendant and that defendant was present and knew what the price was; that the net proceeds showed the loss of a certain amount, and that this statement and result was shown by him to defendant and the latter promised to pay his half thereof, such evidence renders competent the statement from the third person showing the gross and net proceeds and charges.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Barton v. Coulson, 196 Ill. App. 212.

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3. ACCOUNT STATED, § 4\*—*when rendition of statement equivalent to stated account.* In an action to recover an amount claimed to be due on a joint adventure, the presentation by plaintiff to defendant of a statement showing the gross and net proceeds and the ascertainment between them of the amount, when accompanied by proof that defendant then and thereafter promised to pay the plaintiff one-half of the loss incurred, makes the presentation of the statement in legal effect an account stated, the correctness of the items of which need not be proved.

4. JOINT ADVENTURE, § 8\*—*when evidence sufficient to support verdict.* Evidence in an action to recover an amount claimed to be due from defendant to plaintiff on a joint adventure, examined and held sufficient to support a verdict and judgment for plaintiff.

Appeal from the County Court of Stark county; the Hon. FRANK THOMAS, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.

JAMES H. RENNICK, for appellant.

JOHN W. FLING, JR., for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Barton sued Coulson before a justice. The case was tried by a jury in the County Court on appeal and plaintiff had a verdict for \$100.52, and a judgment thereon, from which defendant appeals.

Appellee claimed that he and appellant bought a bunch of cattle together and shipped them to Chicago and sold them there, and that the transaction resulted in a loss of \$201.04. He sued and recovered a verdict for one-half that loss. Appellant claims that no such transaction took place and that he had no interest in said shipment of cattle, that if there was such a transaction, it was a partnership and could only be adjusted in a court of equity; that the statement from the firm at the stock yards which sold the cattle was improperly admitted in evidence; that there is no proof there was any loss; and that the evidence does not sustain the verdict.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Each of the parties has long been engaged in buying, shipping and selling cattle. This was the only transaction between them disclosed by the evidence. Upon the question whether an action at law can be maintained for the loss in this case, or resort must be had to equity, the following statement of the law is made in 2 Bates on Partnership, section 865: "Where the partnership consists of a venture in a single transaction or single purchase, which is closed up and finished, and there are no accounts with third persons to adjust or debts to be provided for by sale and distribution of effects, but the sole question is how much one partner owes the other, an action at law has been sustained between them, being purely a money demand on a single item." In *Hanks v. Baber*, 53 Ill. 292, the court said: "When partners have settled their partnership accounts and a balance is ascertained, an action of assumpsit will lie for money due on an account stated." In *Hurley v. Walton*, 63 Ill. 260, which was an action of assumpsit, the court said: "We are of opinion that the transaction out of which the present claim arose may be regarded as a single adventure between the parties, in which they were only jointly interested, and, therefore, wanting in all the elements to constitute a co-partnership." A judgment for plaintiff was affirmed. *Purvines v. Champion*, 67 Ill. 459. In *Gottschalk v. Smith*, 156 Ill. 377, it was held: "An action for money had and received may be maintained for a share of the profits of a single joint enterprise, under an agreement that such profits should be equally divided, where the transaction is completed and the profits received by the defendant." In *Southworth v. People*, 183 Ill. 621, the court said: "Where two parties engage in a single adventure in which they are jointly interested, the transaction does not constitute the parties partners so as to oust a court of law of jurisdiction." A similar principle is referred to in *Fish v. Lapsley*, 128 Ill. App. 611; *Aldrich v. Mathias*,

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167 Ill. App. 589; and *Clark v. Sidway*, 142 U. S. 682. Authorities in other States holding otherwise are found in a note in 5 L. R. A. (N. S.) 510. Here, the cattle had been sold, a loss had been sustained and the amount thereof had been ascertained between the parties, and appellant had agreed to pay one-half the loss, if the jury were warranted in believing the evidence introduced by appellee. Under such circumstances we hold that an action at law could be maintained.

According to the proofs introduced by appellee, he obtained a written statement showing the gross proceeds of the cattle and the charges at the stock yards and the net proceeds, and he had bought the cattle at a price agreed upon between himself and appellant, and appellant was present when the cattle were weighed and knew what that price was, and the net proceeds deducted from the cost showed a loss of \$201.04, and this statement and result was shown by appellee to appellant and the latter promised to pay his half thereof. This proof made the statement from the stock yards competent evidence.

Appellee did not produce any witness who testified that there was a loss on these cattle. We conclude that the presentation of this statement by appellee to appellant and the ascertainment between them of the amount and the proof that appellant then and several times afterwards promised to pay appellee one-half thereof makes this in legal effect an account stated, in which case the correctness of the items need not be proved. 1 Cyc. 485; 1 R. C. L. 213; *Weigle v. Brautigam*, 74 Ill. App. 285, and cases there cited.

It is argued that the verdict is not supported by the evidence. It is clear that appellant was familiar with the business of buying cattle and shipping them to Chicago for sale, and that he had talked with some one about buying these cattle, and that he was present when they were delivered and weighed and took some part in that transaction. There is evidence that he

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told two or three parties that he was in with appellee on this shipment, and there is a preponderance of evidence that he promised to pay appellee one-half of this loss after it was ascertained. The jury and the trial judge believed the witnesses for appellee. There was little against their statements except an unqualified denial by appellant. In view of the law as we have hereinbefore stated it, the instructions are not seriously imperfect.

The judgment is affirmed.

*Affirmed.*

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**Charles Elliott, Appellee, v. Irvin M. Kidder,  
Appellant.**

**Gen. No. 6,118. (Not to be reported in full.)**

Appeal from the Circuit Court of Ogle county; the Hon. OSCAR E. HEARD, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.

### **Statement of the Case.**

Action by Charles Elliott, plaintiff, against Irvin M. Kidder, defendant, upon four promissory notes, two of which were executed by defendant payable to plaintiff and on two of which plaintiff was surety for defendant and was compelled to pay the amount due by the face of the notes, being approximately \$7,000. Defendant pleaded the general issue. Plaintiff recovered a verdict and judgment for \$3,000, from which defendant appeals.

Defendant claimed that he and plaintiff were partners in various real estate deals and other transactions, and that the two and H. W. Leydig were partners in other real estate deals and other transactions. Defendant claimed that the three met at a hotel at Dixon



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and had a settlement; that Leydig demanded back a note which he had given and defendant held for land in Missouri that was not worth the mortgage upon it, and that defendant surrendered that note to Leydig; that defendant then offered plaintiff certain land in Nebraska, land in Dakota, 8,000 shares of the stock of the Patterson Heat & Light Company at \$1 per share, 6,500 shares of Montana Oil Stock, 2,800 shares of International Mining stock, and some shares of ice, coal and coke plant stock in St. Louis; that plaintiff consented to surrender the notes in suit for that consideration, but said he could not then deliver them because he had them in a bank in Iowa as collateral, but that he agreed to surrender them when his debt to the bank was paid. This alleged settlement, wherein these notes were to be surrendered, was sworn to by defendant and Leydig. Plaintiff denied making any such settlement or agreeing to surrender such notes. There was like evidence of a later interview confirmatory of the alleged settlement and like evidence contradicting it. There is no claim but that plaintiff's notes were valid and it is not claimed that defendant was insolvent. None of the witnesses had ever seen this Nebraska land, and none of them knew whether it was worth anything or not. It had been traded in for an automobile, but there is no proof whether the machine was old or new, nor what it was worth, or that any of the witnesses had ever seen it. None of the witnesses had ever seen the Dakota land or knew anything about its value. Defendant held a deed for it in which the grantee's name was left blank. The proposal was that he deliver that blank deed to plaintiff and let the latter either write in his own name or trade it off to some one else. Defendant was not to warrant the title or to assume any liability. None of the witnesses knew that the shares of capital stock had any value whatever.

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**BROOKS & BROOKS**, for appellant.

**R. P. SCOTT** and **BERT S. DUZAN**, for appellee.

**MR. PRESIDING JUSTICE DIBELL** delivered the opinion of the court.

### **Abstract of the Decision.**

1. **BILLS AND NOTES, § 451\***—*when evidence sufficient to support finding that no settlement made.* Evidence in an action to recover on promissory notes, examined and *held* sufficient to sustain a finding that a settlement had not been made.

2. **APPEAL AND ERROR, § 1543\***—*when omission in instruction not ground for reversal.* An instruction which tells the jury that the testimony of one credible witness may be entitled to more weight than the testimony of many others, if such witnesses have knowingly testified untruthfully and are not corroborated, is not ground for reversal for the omission of the element that such untruthful testimony must relate to a matter material to the issue, where the law was accurately stated in a previous instruction on the subject and the record does not show any contradiction in the testimony except upon matters material to the issue.

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**Lucy Jones, Administratrix, Appellee, v. Crescent Coal Company, Appellant.**

**Gen. No. 6,122.**

1. **MINES AND MINERALS, § 149\***—*when failure to comply with statutory regulation implied to be wilful.* Failure of a coal mine operator to comply with the provisions of the Mines Act (J. & A. §§ 7533-7575), requiring the sprinkling or spraying of roadways, will be implied to be wilful.

2. **MINES AND MINERALS, § 176\***—*when evidence sufficient to support finding that explosion due to failure to sprinkle roadway.* In an action against a coal mine operator to recover for the death of a shot firer alleged to have been caused by an explosion resulting from a failure of defendant to sprinkle the roadways of its mine in accordance with the requirements of the Mines Act (J. & A. §§ 7533-7575), evidence examined and *held* to support a verdict for plaintiff.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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3. MINES AND MINERALS, § 125\*—*when contributory negligence not a defense.* In an action against a coal mine operator to recover for the death of a shot firer in a mine alleged to have been caused by an explosion resulting from the failure of defendant to sprinkle the roadway of its mine in the manner required by the Mines Act (J. & A. §§ 7533-7575), contributory negligence is not a defense.

4. MINES AND MINERALS, § 41\*—*when provisions of statute applicable to shot fires.* The provisions of the Mines Act (J. & A. §§ 7533-7575), are to be construed as being for the protection of shot firers in mines.

5. EVIDENCE, § 232\*—*when verdict of coroner's jury admissible.* In an action to recover for the death of a shot firer in a mine alleged to have been caused by an explosion, the verdict of a coroner's jury that the death of deceased was caused by asphyxiation from gases generated by an explosion caused by a blast is admissible, although coming from the files in the coroner's office and not from the circuit clerk's office.

6. MINES AND MINERALS, § 152\*—*when expert testimony inadmissible.* Testimony of an expert, in an action to recover for the death of a shot firer, as to other explosions in the mine and his theory as to what caused them and what effect followed them, properly excluded.

7. APPEAL AND ERROR, § 1561\*—*when refusal to give instruction not ground for reversal.* A refusal to give instructions on principles of law covered in instructions already given is not ground for reversal.

Appeal from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915. Rehearing denied December 8, 1915.

QUINN & QUINN and WEIL & BARTLEY, for appellant.

J. L. MURPHY, for appellee, SUCHER & MOORE, of counsel.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

On January 15, 1913, Edward P. Jones, Junior, and a man named Benn were working for the Crescent Coal Company in its coal mine as shot firers, when an explo-

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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sion occurred by which they were killed. Jones left a widow, and this suit was brought by the administratrix of his estate for her benefit, under section 29c of the Act concerning Mines and Miners (J. & A. ¶ 7503). The cause was tried upon a declaration and a plea of not guilty. Plaintiff had a verdict and judgment for \$2,800, from which defendant below appeals.

The verdict and the judgment rest on the fourth count of the declaration. Besides many allegations showing that appellant was operating this coal mine and, that Jones was a shot firer therein in the second south entry, that count averred that said entry and other entries connected with and near it were so dry that the air had become charged with dust and had been in that condition for a long time prior to said date; that appellant wilfully neglected to have said passageways and entries regularly and thoroughly sprayed, sprinkled and cleaned, as required by statute, and that by reason of such wilful neglect and while Jones was firing shots for appellant near said entry, said dry air charged with dust caught fire and exploded with great force, because appellant had wilfully neglected to have such roadways or entries regularly and thoroughly sprayed, sprinkled and cleaned, and that by reason of such explosion Jones was killed. There are two provisions of the statute on this subject. Section 14m (J. & A. ¶ 7488) is as follows: "In case the passageways, roadways or entries of any mine are so dry that the air becomes charged with dust the operator of such mine must have such roadways regularly and thoroughly sprayed, sprinkled or cleaned." The fifteenth clause of section 20a (J. & A. ¶ 7494) prescribes the following among the duties of the mine manager: "He shall see that all dusty haulage roads are thoroughly sprinkled at regular intervals designated by the mine inspector." Jones was firing shots in rooms off the second south entry, and Benn in rooms off the first south entry. After the explosion the body

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of Jones was found in the second south entry near room 6 and the body of Benn in the first south entry near room 3. Room 1 in each entry was furthest north. The air was moving in the entry from north to south. That part of the mine had been operated for several months and we are satisfied from the evidence that these entries were very dusty. Appellant had never sprinkled them or sprayed them until a few days before this accident, and they had not been sprinkled or sprayed at all for a day or two before the accident, and were very dusty on the day of the accident and prior to the explosion. If appellant failed to obey the statutes above quoted, the law will imply that that failure was wilful. This dust was partly coal dust and partly arose from the drying up of the earth in the entry. Appellant argues from the evidence that this was not coal dust but earth dust and that, if this was a dust explosion at all, only an explosion of coal dust would render appellant liable; and also that this was not a dust explosion and therefore appellant is not liable under this fourth count and the statute. We are of opinion that the jury were warranted in finding from the evidence that if this explosion originated from gas resulting from the firing of a shot, still that explosion reached the entry and fired the dust in the air, and that it reached and killed Jones because the air in the roadway was charged with dust, and under such circumstances appellant would be liable, as shown in *Davis v. Illinois Collieries Co.*, 232 Ill. 284. Appellant argues that Jones and Benn commenced at the wrong place in that entry to fire the shots, and that the gas from the first shot remained in the mine because they had begun to fire at the wrong place, and that therefore they were guilty of negligence and that their negligence caused the explosion and therefore appellee could not recover. If the wilful failure of appellant to properly spray and sprinkle the entries caused the explosion, then the contributory negligence of the deceased

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is not a defense. *Peebles v. O'Gara Coal Co.*, 239 Ill. 370; *Hougland v. Avery Coal & Mining Co.*, 246 Ill. 609; *Brunnworth v. Karens-Donnewald Coal Co.*, 260 Ill. 202, and many cases cited in the latter opinion. It is held in *Davis v. Illinois Collieries Co.*, *supra*, and *Hougland v. Avery Coal & Mining Co.*, *supra*, that the fact that the deceased fired a shot prepared in an unskilful manner is not a defense. It is held in *Brennen v. Chicago & C. Coal Co.*, 241 Ill. 610, and *Hougland v. Avery Coal & Mining Co.*, *supra*, that shot firers are within the protection of this statute. We are therefore of the opinion that the jury were warranted by the evidence in finding a verdict for the plaintiff.

It is urged that the court erred in admitting in evidence the verdict of the coroner's jury, which found that the deceased came to his death at the mine of appellant by asphyxiation from gases generated from an explosion of accumulated coal dust near room 1 in the second south entry, caused by a blast or blasts discharged in the process of mining coal. Section 14 of chapter 31 of the Revised Statutes (J. & A. ¶ 2405), relating to coroners, makes it the duty of the coroner's jury to inquire how, in what manner, and by whom or what, the said dead body came to its death, and of all other facts concerning the same, together with all material circumstances in any way related to or connected with the said death. Under the authorities, a verdict of a coroner's jury is admissible in evidence, which is confined to finding those facts concerning which the jury are directed to make inquiry. *U. S. Life Ins. Co. v. Vocke*, 129 Ill. 557. This verdict is confined to such an inquiry. It does not find that appellant wilfully or negligently or otherwise failed to spray or sprinkle or clean any passageways or entries in this mine. It is argued that said verdict was not competent because it did not come from the office of the circuit clerk, but had always been among the files in the coroner's office in the courthouse. The verdict of the

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coroner's jury held to have been properly admitted in evidence in *Stollery v. Cicero & P. St. Ry. Co.*, 243 Ill. 290, was not shown to have been filed with the circuit clerk.

John Dunlap testified as an expert for appellant. He had witnessed an explosion of dust in June, 1914, and had witnessed another explosion about five years before, and he was asked various questions as to those explosions, to which the court sustained objections. The witness did not know what the condition of appellant's mine was just before the explosion which caused the death of Jones. There was no proof that the conditions were the same at the time of those other two explosions. Testimony as to those other explosions and the theory of the witness as to what caused them and what effect followed them would have introduced into the case immaterial issues. The objection to said questions was properly sustained. Appellant was permitted to put hypothetical questions to this witness and had his views on every material subject to which he was competent to testify. He was asked what in his opinion caused the explosion here in question and whether in his opinion it was a gas explosion or a dust explosion or a gas explosion augmented by a dust explosion. If these questions were material, then they asked for a decision upon the very question to be submitted to the jury, and were therefore incompetent. If they were immaterial, then it was not error to sustain objections to them. It is obvious from other evidence that a dust explosion could originate in the condition of the gas resulting from firing shots. He was asked to state this from his examination of the mine and from his experience, without asking him to detail what he learned from his examination of the mine. We are of opinion the court did not err in its rulings upon the testimony of this witness.

Complaint is made of instructions Nos. 6, 8, 9 and 11 given at the request of appellee. Their object was



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to tell the jury that if the appellant wilfully violated the statute first above recited, and thereby caused the death of Jones, it would not be a defense that Jones or Benn had been negligent in the manner of firing the shots or that Jones had been negligent in any other respect which might have contributed to his death. They are supported by authorities above cited.

Appellant complains of the refusal of certain instructions marked "A," "B," "C," "D," "E," "F" and "G." The court gave eight instructions as requested by appellant, and modified and gave several other instructions requested by appellant, and appellant seems to have had all the principles of law stated to which it was entitled. None of the seven instructions, of the refusal of which complaint is made, are correct. Some omit necessary elements; some omit to submit whether the failure of appellant to sprinkle was wilful; others are formed so as to give the jury to understand that if the explosion originated in an explosion of gas, resulting from the firing of a shot, then appellee could not recover, omitting the consideration of the evidence tending to show that this explosion was communicated to the dust in the air in the roadway and would not have reached Jones if the roadway had been properly sprinkled, and ignoring the things suggested in *Davis v. Illinois Collieries Co.*, *supra*, on page 290.

We find no reversible error in the record and the judgment is therefore affirmed.

*Affirmed.*

MR. JUSTICE NIEHAUS took no part.

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Baitty v. Toledo, Peoria & Western Ry. Co., 196 Ill. App. 225.

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**Harley Baitty, Appellee, v. Toledo, Peoria & Western  
Railway Company, Appellant.**

**Gen. No. 6,125. (Not to be reported in full.)**

Appeal from the Circuit Court of Peoria county; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed October 20, 1915.

**Statement of the Case.**

Action by Harley Baitty, plaintiff, against the Toledo, Peoria & Western Railway Company, defendant, for personal injuries resulting in the amputation of both legs. There was verdict and judgment for plaintiff for \$25,000, from which defendant appeals.

The declaration alleged that plaintiff was in the act of boarding the train with the intention of becoming a passenger thereon and was in the exercise of due care for his own safety; that defendant started the train without warning him, after plaintiff had been invited by its servants to board said train at that place and time, and that because of such wrongful conduct plaintiff was injured. The declaration also alleged in each of said counts that defendant had long been in the habit of stopping its passenger trains at a point between the Union Depot and the Illinois River bridge in the City of Peoria; that for a long time prior thereto it had been the practice and custom for large numbers of persons to board the passenger trains of defendant at such point; and that defendant knew of and sanctioned such custom, and had permitted and invited intending passengers to board its trains in that manner.

The evidence showed that the passenger trains of defendant, leaving the Union Depot in Peoria on their eastbound run, cross Chestnut street immediately and proceed in a northeasterly direction across certain tracks of the Rock Island Railroad and the bridge over the Illinois River, and thence east. It is the contention

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of plaintiff that defendant's train No. 2, on the night in question, came to a full stop just after leaving the depot, so that the first passenger coach rested on Chestnut street; that plaintiff approached this motionless train for the purpose of boarding it, having a ticket in his pocket entitling him to passage from Peoria to Washington, Illinois, took hold of the hand rails with both hands and was about to place his foot on the lowest step when the train started without any warning and with a great jerk; that he had been invited to board this train at this point by a man in uniform, standing on the platform of the car, whom he understood to be one of defendant's servants; and that the jerk with which the train was started caused him to lose his hold on the car and he was thrown under the wheels and injured. It is the contention of defendant that this train did not stop at Chestnut street that night at all; that plaintiff attempted to get on the train while it was in motion and was injured thereby; that no employee of the company invited him to get on; that plaintiff was intoxicated when he tried to get on the train; and that defendant had no custom of stopping its passenger trains at Chestnut street and inviting and permitting passengers to board its trains there, but that it was occasionally obliged to stop its trains so that a part thereof rested on Chestnut street, because its crossing of another railroad ahead was blocked by other trains.

Two witnesses testified for plaintiff that the train was at a standstill when he tried to get on, one of these witnesses being plaintiff. Four witnesses testified for defendant that the train was in motion when plaintiff was trying to board it, and of these witnesses two were not railroad men, while the other two were not employed by appellant but by another railroad company at Peoria. On the question whether or not train No. 2 stopped at Chestnut street the night in question before plaintiff attempted to get on, two witnesses, one

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being plaintiff, testified that the train did so stop, while at least nineteen witnesses testified that the train did not stop at all after leaving the Union Depot until after the rear of the last coach was north of Chestnut street a considerable distance. Some of these witnesses were railroad men working for appellant, but at least ten of the witnesses on this point had no connection with defendant or any other railroad company.

On the question whether or not an employee of defendant invited plaintiff to board the train at Chestnut street, plaintiff testified that, as he went along the street towards the train, a man on the platform, who appeared to be dressed in a blue uniform, called out to him to "Hurry up," but plaintiff afterwards failed to identify either the conductor or the brakeman on duty on that train that night as being the person who had made that remark to him, while the conductor and the brakeman, the only uniformed servants of defendant on that train that night, denied that they had seen plaintiff before he was run over or that they had urged or invited him to board the train.

Plaintiff and four others testified that he was not intoxicated the evening of the accident, while sixteen witnesses testified for defendant to circumstances making it apparent that appellee was under the influence of liquor when he attempted to board the train. Three doctors and two nurses testified to the odor of the liquor on his breath after the accident and to the fact that the amount of anaesthetic required in his case before operating upon him immediately after the accident was less than usual because of his being under the influence of liquor. In rebuttal, one of plaintiff's witnesses testified that while plaintiff lay on the ground, just after being injured, some one produced a bottle of whisky and gave a part of its contents to plaintiff. This witness was the only one who testified to this occurrence and he was unable to identify the

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person who produced the liquor. Others present at the same time denied that any such thing happened.

Fifteen witnesses testified for plaintiff that this particular train was in the habit of stopping with one or more of its coaches on Chestnut street and that passengers frequently boarded it at that point, and while the train was at a standstill. Twenty-eight persons testified for defendant that there was no established custom on the part of the servants of defendant operating this train to bring it to a stop at Chestnut street, and many of these witnesses stated that such persons as occasionally boarded his train at Chestnut street did so while the train was moving slowly across the street. Some of defendant's witnesses on this point were railroad men, but many of them were without any apparent interest.

FRANK T. MILLER and JOHN M. ELLIOTT, for appellant; STEVENS, MILLER & ELLIOTT, of counsel.

HENRY R. RATHBONE and CLARENCE W. HEYL, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

### Abstract of the Decision.

CARRIERS, § 289\*—*when carrier not liable to passenger attempting to board train.* In an action to recover for injuries to passenger attempting to board train, evidence examined and *held* to show that passenger was intoxicated at time of attempting to board train while in motion, that he was without the exercise of due care for his own safety and that carrier was not negligent.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Barritt v. Steidinger, 196 Ill. App. 229.

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**Charles E. Barritt, Appellee, v. A. W. Steidinger,  
Appellant.**

**Gen. No. 6,126.**

1. **CONTRACTS, § 187\***—*when construction of parties adopted by court.* If a contract is ambiguous the construction which the parties have placed upon it by their conduct will be adopted by the courts, if such construction is reasonable, and in such case evidence as to the construction by the parties is admissible.

2. **BROKERS, § 84\***—*when evidence of compromise admissible.* In an action to recover compensation for the negotiation of the sale of realty, a letter containing an admission that the deal shall be put through as arranged if plaintiff refuses his claim for compensation is admissible in evidence.

3. **APPEAL AND ERROR, § 788\***—*when matter not contained in record not considered.* A bill of particulars and an affidavit of merits not contained in the bill of exceptions are not before the court for consideration on appeal.

Appeal from the Circuit Court of Iroquois county; the Hon. FRANK L. HOOPER, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.

ROBERT HENNING, O. F. MORGAN and F. M. CRANGLE,  
for appellant.

PALLISSARD & BENJAMIN and SAUM & MALO, for ap-  
pellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion  
of the court.

Charles E. Barritt was a real estate agent at Watseka. A. W. Steidinger lived at Forrest in Livingston county and owned a farm in Iroquois county which he wished to sell. He entered into a written contract, authorizing Barritt to sell it on terms therein stated, Barritt to have all he could get over a certain price as his compensation for selling it. Barritt procured A. Buchholz and George Worthington to buy it and signed a contract with them. Steidinger refused to convey. Barritt brought this suit to recover his agreed compensation, and filed a declaration containing a special

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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count on the contract, and the common counts. Defendant pleaded the general issue, there was a jury trial, and Barritt had a verdict and a judgment for \$1,100, from which Steidinger appeals. Appellant claims that the contract had a plain and unambiguous meaning; that that meaning was not what was alleged in the special count and therefore appellee could not recover; that the court erred in admitting oral and documentary evidence showing how the parties themselves construed the contract; and that there are other minor errors in the record. Appellee contends that the contract has the meaning which he gave it in his declaration; that, if not, it is ambiguous and evidence was competent to show the construction which the parties themselves placed upon it; that the parties construed it as he declared upon it in the declaration; that, as so construed, he obtained the price called for by the contract and was entitled to recover.

The date of the contract was November 22, 1913, and the body of it was as follows:

“I, the undersigned, hereby authorize C. E. Barritt, of Watseka, Illinois, to sell the following described real estate, situated in Iroquois County, Illinois.

“The west half of the N. W.  $\frac{1}{4}$  Sec. 34, T. 27, R. 12 W. containing eighty acres more or less, for the sum of Eight Thousand Dollars upon the following terms: ~~One hundred dollars~~ Dollars when the sale is made. ~~Balance March 1st, 1914.~~ \$8,000.00 Dec. 1st, 1913, subject to incumbrance of \$5,000.00 and interest from Dec. 1st, 1913.

“In consideration of C. E. Barritt using his best efforts to sell said premises and the payment of One Dollar receipt of which is hereby acknowledged. He is to have the exclusive sale of the above described premises until January 1st, 1914. And that he is to have everything and all above \$8,000.00 Dollars, that he may sell the above described real estate for, as his commissions for selling the same. And I hereby agree to



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furnish an abstract to said premises showing a merchantable title. And make the consideration in the deed any amount he may designate.”

The proof shows that the words “One hundred dollars” and “Balance March 1st, 1914” were typewritten in the contract when it was prepared for signature, but were stricken out by appellant’s direction and the line and a half written in its place. The construction contended for by appellee is that he was to sell the farm for \$8,000; that \$5,000 of that was to be paid by assuming an incumbrance for that amount upon the farm, (with interest from December 1, 1913, and that the balance of \$3,000 was to be paid in cash on the same date. The purchasers agreed to pay \$3,000 on or before December 1, 1913, and to assume the mortgage of \$5,000 and to deliver three stallions. They did deposit \$3,000 in the First National Bank of Watseka to await the delivery of an abstract showing merchantable title, and they delivered the three horses to Barritt, which horses on appellee’s theory of the construction of the contract, would be his commissions. Either the contract means that the land was to be sold for \$8,000 as indicated in the first and last parts of the contract, or, if the language therein, “\$8,000 Dec. 1st, 1913, subject to incumbrance of \$5,000.00 and interest from Dec. 1st, 1913,” standing by itself would be construed to mean a sale for \$13,000, then the contract is ambiguous, and uncertain as to the selling price. We can hardly say that it clearly means a sale for \$13,000 when, as we shall see hereafter, the parties themselves construed it to mean \$8,000. If a selling price of \$8,000 for the farm is the true construction, appellee’s declaration and proofs entitled him to recover. If the contract is ambiguous, then it is a familiar rule that the construction which the parties have placed upon it by their conduct will be adopted by the courts in the event of litigation concerning it, if that construction is reasonable. *People v. Murphy*, 119 Ill. 159; *Burgess*

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*v. Badger*, 124 Ill. 288; *Carroll v. Drury*, 170 Ill. 571; *W. H. Purcell Co. v. Sage*, 200 Ill. 342; *Consolidated Coal Co. of St. Louis v. Jones & Adams Co.*, 232 Ill. 326; *McLean County Coal Co. v. City of Bloomington*, 234 Ill. 90; *D. M. Goodwillie Co. v. Commonwealth Elec. Co.*, 241 Ill. 42. The court therefore properly admitted evidence showing how the parties understood the contract.

The proof shows that upon making the sale appellee twice called appellant by telephone and told him the terms upon which he had sold it, and for him to deliver his abstract to the First National Bank of Watseka for examination, and that the parties were ready to deposit the \$3,000 there which he was to receive, and to assume the incumbrance, and to deliver the three horses, and that appellant expressed himself satisfied. These conversations are not denied by appellant or by any one. Appellee then wrote two letters to appellant in which he told him what had been done and to turn the abstract over for examination. Under date of December 18, 1913, appellant wrote appellee a letter in which he expressed willingness to sell the property on the terms specified, except that he would only give appellee a commission of two per cent.; or he was willing that appellee should have \$500 or \$600 for his work, and the deal should be put through. Appellant contends here that this letter was an offer to compromise and therefore it was error to admit it in evidence. The general rule is as contended for by appellant, but the letter contains an admission that the deal shall be put through as arranged, if appellee would reduce his claim for compensation, and for that reason we are of opinion it was competent. But, if it was incompetent it did appellant no harm, because of other correspondence in evidence. A man by the name of Horneman, connected with the Watseka Creamery, bought a farm adjoining this farm of appellant's. On November 27, 1913, appellant wrote him that he had heard that he had bought this other

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farm and had paid \$200 per acre for it and would like to sell him appellant's farm. Under date of November 9, 1913, Horneman wrote appellant that he paid considerably less than \$200 per acre for his farm and asked appellant what the price of his eighty was. To this appellant replied that he had offered his eighty for \$100, but his wife would not sign the papers and so that they had made up their minds not to sell it for less than \$150 per acre. Appellant contends that this correspondence was incompetent, but it contains an admission over the signature of appellant that he offered his eighty acres for \$100 per acre, and that the deal fell through because his wife would not sign the deed. Appellant's counsel contend that this might have referred to a different eighty acres, but the proof disclosed that the farm bought by Horneman was adjoining the eighty of appellant in question and appellant did not testify to contradict that evidence. Thereafter, under date of January 4, 1914, appellant again wrote appellee that he had talked the matter over with his wife and she would not sign unless he would accept \$2 per acre as commission; that he had really given this farm to his wife and they were willing to take what he sold the farm for and give appellee \$2 per acre for selling it. Nowhere, in correspondence or conversation, did appellant claim that the farm should have been sold for \$13,000 or that he should have \$8,000 besides the mortgage. That theory has been invented since this suit was begun and rests exclusively upon the language of the contract, and is not sustained by any evidence offered by appellant. It is clear from all the evidence that both parties construed the contract to mean a sale of the farm for \$8,000 and the receipt of the \$3,000 by appellant and an assumption of the mortgage by the purchaser, but when appellant learned the value of the three horses which the purchasers agreed to give over the \$8,000, the wife refused to sign and appellant re-

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fused to convey. The evidence was competent and it is all one way, and supports the special count of the declaration and entitled appellee to recover.

The proof as to the value of the horses ranged from \$1,250 to \$1,500. One witness said that one of the horses was lame and he refused to put a price on that one. On that account, probably, the jury found only \$1,100. It seems that after this deal fell through, appellee became the owner of the horses by some other deal between himself and Buchholz and Worthington, and appellant introduced a letter in which appellee offered to sell the horses for \$1,200. That transaction, after appellant had refused to perform his contract, has no bearing on this case, except as it tends to show what value appellee placed upon the horses.

There was a bill of particulars filed with the declaration and an affidavit of merits by appellant concerning his version of the transaction, and appellant seeks to make some use thereof in argument here. We do not see that these papers change the situation; but neither of these documents is in the bill of exceptions, and therefore they are not before this court for consideration. *Eggleston v. Buck*, 24 Ill. 262; *Star Brewery v. Farnsworth*, 172 Ill. 247; *Dumbeck v. Walsh*, 179 Ill. App. 239. In *George H. Hess Co. v. Dawson*, 149 Ill. 138, there is a suggestion that if the bill of particulars was filed with the declaration, it might be treated as a part of the record, but that position was abandoned in *Boyles v. Chytraus*, 175 Ill. 370, where it was said: "The copy of the instrument sued upon, or the bill of particulars, indorsed on the declaration, being no part thereof, is no part of the record; and a bill of exceptions can alone inform us of what it is."

The ruling of the court upon the instructions was in harmony with the views above expressed and is approved. If any instruction appeared to authorize the jury to construe the contract, an instruction requested by appellant also submitted the construction of the

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contract to the jury, and appellant cannot complain thereof. The jury did construe the contract correctly. The judgment is affirmed.

*Affirmed.*

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**Fred D. Holt, Appellant, v. City of Moline et al.,  
Appellees.**

**Gen. No. 6,132.**

1. PLEADING, § 42\*—*when original declaration abandoned.* A party who elects not to abide by his original declaration, but obtains leave to amend it and files an amended declaration, abandons his original declaration.

2. MUNICIPAL CORPORATIONS, § 1122\*—*when city not required to keep park in safe condition.* A city is not required by law to keep every part of a public park safe for public travel.

3. PLEADING, § 52\*—*when declaration insufficient.* It is not sufficient for a declaration to aver that a particular duty arises upon defendant, but it must state the facts from which the law will raise that duty.

4. PLEADING, § 45\*—*how question as to whether new cause of action stated in amendment determined.* The question whether the cause of action stated in an amended declaration was stated in the original declaration is determined by a comparison of the two declarations.

5. LIMITATIONS, STATUTE OF, § 58\*—*when cause of action barred.* On amendment of a declaration if amendment is found to be a different mode of stating the same matter, the statute of limitations which ran after the original declaration and before the amendment was filed is not a defense.

6. LIMITATION OF ACTIONS, § 71\*—*when statute does not run in action against city.* In an action against a municipal corporation to recover for personal injuries alleged to have arisen through its negligence, amendments of pleadings examined and held not to state a cause of action subject to a plea of the statute of limitations.

Appeal from the Circuit Court of Rock Island county; the Hon. ROBERT W. OLMSTED, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded with directions. Opinion filed October 20, 1915.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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W. R. MOORE and DIETZ & SINNETT, for appellant.

JAMES M. JOHNSTON, for appellees.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Holt sued the City of Moline and the Tri-City Railway Company in an action on the case in the Circuit Court of Rock Island county and filed a declaration containing five counts. The city demurred thereto and the demurrer was sustained. A demurrer by the railway company was also sustained, and leave was granted to plaintiff to amend his declaration, and afterwards he filed an amended declaration containing eight counts. The city demurred thereto and the demurrer was sustained as to counts 1 to 5 thereof and overruled as to counts 6, 7 and 8. To said counts 6, 7 and 8, the city filed a plea of not guilty and two pleas of the statute of limitations. Holt demurred to said pleas of the statute of limitations and that demurrer was overruled. Holt elected to abide by his demurrer to said pleas and the city had a judgment in bar against Holt, from which Holt prosecutes this appeal and assigns three errors, namely: (1) that the court erred in sustaining the demurrer of the city to the original declaration; (2) that the court erred in sustaining the demurrer to the first five counts of the amended declaration; and (3) that the court erred in overruling the demurrer to the pleas of the statute of limitations, filed by the city, and in entering final judgment for the city in bar of the action.

Appellant did not elect to abide by his original declaration, but obtained leave to amend his declaration and filed an amended declaration. He thereby abandoned his original declaration. This record therefore does not present the question whether the court erred in sustaining the demurrer of the city thereto.

The case stated against the city in the several counts of the amended declaration is that on July 4, 1912, and

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for many years prior thereto, the city had control of certain public grounds, known as "Outlot 2" in Prospect Park in said city, except that part of said outlot occupied by the railway company's track, and that said city owed a duty to keep said lot in safe condition and free from obstructions liable to injure persons lawfully passing over said lot; that the railway company then and long prior wrongfully had on a part of said outlot certain planks, rails, iron junk and a snowplow; that in disregard of its duty the city permitted said outlot to be in a bad and unsafe condition, with the said snowplow and other articles thereon, without guards, lights and warning to prevent people resorting to said park from falling over said articles and being injured, and that the appellant, while in the exercise of due care for his own safety, unavoidably stumbled over said articles and was injured. The first five counts of said amended declaration did not state any facts which made it the duty of the city to keep this particular place safe for public travel, unless that duty may justly be inferred from the allegation that these were public grounds and a park possessed and controlled by the city. We are of the opinion that a city is not required by law to keep every part of a public park safe for public travel. Certain parts of a public park should be kept in a safe condition for public travel, but there often are in such a park, ponds, lakes, knolls, ravines and forests not intended and not understood by the public to be intended for public travel; and machinery and appliances with which a park is kept in order may very reasonably be stored in some part thereof. It is not sufficient for a declaration to aver that a particular duty rested upon a defendant, but it must state the facts from which the law will raise that duty. *Mackey v. Northern Milling Co.*, 210 Ill. 115; *McAndrews v. Chicago, L. S. & E. Ry. Co.*, 222 Ill. 232. The demurrer was therefore properly sustained to the first five counts of the amended declaration.



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The sixth, seventh and eighth counts of the amended declaration did fully and in various ways state a long-continued custom of many people to resort to this particular part of the park with the knowledge of the city, and apparently stated a good case against the city. The remaining question is whether these counts stated a new cause of action against the city or were only a restatement and more ample statement of that which was imperfectly alleged in the original declaration. If they stated a new cause of action, the demurrer to the pleas of the statute of limitations was properly overruled. If they restated a good cause of action defectively stated in the original declaration, then the demurrer to these pleas should have been sustained. *Chicago City Ry. Co. v. Cooney*, 196 Ill. 466; *Salmon v. Libby, McNeil & Libby*, 219 Ill. 421; *St. Louis Merchants' Bridge Terminal Ry. Ass'n v. Schultz*, 226 Ill. 409; *Lee v. Republic Iron & Steel Co.*, 241 Ill. 372; and *McInerney v. Western Packing & Provision Co.*, 249 Ill. 240. Under our practice the question whether the cause of action stated in the amended declaration was stated, though defectively in the original declaration, is determined by a comparison of the two declarations; and if they are found to be different modes of stating the same matter, the statute of limitations which has run after the original declaration and before the amended declaration was filed, will not be a defense. *Chicago & N. W. Ry. Co. v. Gillison*, 173 Ill. 264. We discussed this question in *Sehnert v. Schipper & Block*, 168 Ill. App. 245, on pp. 250-254. The fourth count of the original declaration alleged that the city possessed and controlled said outlot No. 2 (except that part thereof occupied by the railway company) as a part of Prospect Park, and that that part of said park was frequented by a large number of people. We conclude that that allegation defectively stated the matter absent from all the other counts of the original declaration and absent from the first five counts of the

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amended declaration, and fully and elaborately set forth in the sixth, seventh and eighth counts of the amended declaration, and that therefore the three counts last named did not state a new cause of action, but stated with much more particularity and completeness the cause of action defectively stated in the fourth count of the original declaration. The demurrer by appellant to the pleas of the statute of limitations should have been sustained. The judgment is therefore reversed and the cause remanded with directions to sustain the demurrer to the pleas of the statute of limitations.

*Reversed and remanded with directions.*

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**Thomas Claffy, Administrator, Defendant in Error,  
v. Mary Farrell, Plaintiff in Error.**

**Gen. No. 5,758.**

1. EXECUTORS AND ADMINISTRATORS, § 397\*—*when a decree for sale of homestead should not be made.* Where an intestate had an estate of homestead in land sought to be sold for the payment of debts for which payment the personal estate of intestate was insufficient, it was error to decree the sale prayed for unless the estate of homestead was waived or assigned in the manner provided by law.

2. HOMESTEAD, § 83\*—*when widow does not abandon homestead by remarriage.* In case a widow having a homestead estate in land of a deceased husband remarries, she retains her homestead estate in such land notwithstanding the second marriage, but the second husband and his children acquire no such estate in such land.

3. EXECUTORS AND ADMINISTRATORS, § 397\*—*when homestead cannot be sold for debts.* Land belonging to an intestate which was his homestead cannot be sold to pay his debts where it appears that the value of the land above incumbrances is not in excess of \$1,000.

4. EXECUTORS AND ADMINISTRATORS, § 396\*—*what interest of intestate in land may be sold to pay debts.* The interest of an intestate in land in which he had no homestead estate, but wherein his

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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wife had such an estate, may be sold to pay debts subject to such homestead estate.

5. EXECUTION, § 9\*—*when interest of heir in land may be sold subject to homestead of wife.* The estate of an heir in land may be levied upon and sold for the payment of his debts subject to the homestead estate of his wife in such land.

6. EXECUTION, § 8\*—*when remainder in land subject to homestead may be sold.* The estate of a remainder-man in land subject to the homestead estate of another person, whether assigned or not, may be subjected to the payment of the debts of such remainder-man, either before or after his death.

7. EXECUTORS AND ADMINISTRATORS, § 397\*—*when decree ordering sale of land subject to homestead not erroneous.* In a petition by an administrator to sell the real estate of his intestate to pay debts where the personal estate of the intestate was insufficient to pay such debts, a decree ordering such sale subject to the homestead estate of intestate's widow held not erroneous, where intestate in his lifetime had no homestead estate in such land.

8. APPEAL AND ERROR, § 1270\*—*when appellate court will presume evidence sustained finding in decree.* Where, on appeal from a decree finding facts to sustain it, there is no certificate or other showing of the evidence on which the decree was made, and where the record does not purport to show all the proceedings in the trial court, the Appellate Court will presume that the evidence sustained the finding of facts in the decree unless it appears from the record that the decree was not or could not be sustained thereby, and will not without evidence presume that the evidence was inconsistent with the facts found and the conclusion therefrom in the decree.

9. EXECUTORS AND ADMINISTRATORS, § 417\*—*how administrator claiming property as mortgagee brought in as party to action to sell land for debts.* In a petition by an administrator to sell the real estate of his intestate to pay debts for the payment of which intestate's personal estate was insufficient, which petition alleges that the title to the real estate sought to be sold was in plaintiff individually as mortgagee, and where such administrator filed in the cause an individual appearance as such mortgagee in the usual form of such entries in chancery suits, a decree of sale fixes such mortgagee's rights in the property as an individual, and brings him into court as effectually as though the court had expressly ordered that he be made a defendant in the cause, it being unnecessary in such case for plaintiff to procure an express order making him a defendant as an individual, or to have summons issued and served on him individually as a lien holder as required by section 102 of the Administration Act (J. & A. § 151).

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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10. **PARTIES**—*how character in which party acts is to be determined.* The character in which a person is in court is to be determined from the body of the pleadings in the action.

11. **PARTIES**—*when administrator in court in representative capacity.* It is possible for a person to be in court in a representative and not in an individual capacity where on the evidence he might be in court in either capacity, as for example, where an administrator who appears as petitioner for leave to sell real estate of his intestate to pay debts, for the payment of which the personal estate of intestate is insufficient, is also, in his individual capacity as mortgagee, the holder of the title to such real estate.

12. **APPEAL AND ERROR, § 1268\***—*when presumed appearance regularly made.* On appeal from a decree where it appears from the record that a defendant appeared by an agent after summons had been issued but not served on such defendant, the Appellate Court will presume that evidence was offered as to the authority of the agent to enter appearance for such defendant or that some other entry of appearance was made, where the decree finds that such defendant did enter an appearance in the cause without saying on what evidence the finding is based and where there is no certificate of evidence.

13. **APPEAL AND ERROR, § 1273\***—*when presumed that evidence heard in support of findings of County Court.* On appeal from a decree of the County Court, the proceeding in which the decree appealed from was entered is to be aided by every presumption that evidence was heard in support of the finding of facts contained in the decree which would prevail if the proceeding had been in the Circuit Court.

. Error to the County Court of Lake county; the Hon DEWITT L. JONES, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed October 20, 1915. *Certiorari* denied by Supreme Court (making opinion final).

EDWIN L. WAUGH and HAMLIN & TOPLIFF, for plaintiff in error.

COOKE, POPE & POPE, for defendant in error.

MR. JUSTICE CARNES delivered the opinion of the court.

We have heretofore sustained a demurrer to pleas of release of errors filed by certain of the defendants in error, and given such defendants leave to join in error. We recited in the opinion then filed (196 Ill.

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App. 65), the assignment of errors and the condition of the record so far as deemed necessary for the consideration of the questions then before us, and we will not here repeat what we there said. The defendants, Thomas Claffy, Joseph M. Barron, William Ryan, Tobias Jensen, William C. Upton and E. M. Hauser have filed their joinder in error. In the decree, after stating the venue, title of the court and the cause, it is recited to the effect that on the 9th day of August, 1895, came the petitioner by his attorneys, and upon their motion it appearing to the court that each and all of the defendants therein except the defendant, Jane E. Shaw, had been duly and personally served with summons therein ten days and more before the first day of the ten present term of said court; and that the defendant Jane E. Shaw had in writing waived the issuing and serving of process therein, entered her appearance and consented to a hearing at the then present term of said court. That the infant defendants, Edward Farrell and Mary Farrell, by Lewis O. Brockway, their guardian *ad litem*, had filed their answer and the petitioner his replication to the same, and that the adult defendants having failed to plead, answer or demur to said petition as required by a former order of court, had therein failed and made default. That it was therefore ordered, adjudged and decreed by the court that each and all of the adult defendants be defaulted for noncompliance with said order. That said default be entered and said petition taken as confessed by each and all of the said adult defendants. That thereupon the cause coming on on that day (August 9, 1895) to be heard upon the petition taken as confessed by each and all of the adult defendants, the answer of said infant defendants by their guardian *ad litem* and the replication to such answer and the proofs both oral and documentary taken and heard in open court, and the court having heard the evidence and the arguments of counsel and

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being fully advised in the premises, on consideration thereof, found that each and all of the material allegations in the petition contained were true as therein stated; that the court had jurisdiction of the subject-matter of said cause and of each and all of the parties thereto.

And the court further found that William E. Farrell, named in said petition, departed this life intestate at said county of Lake on March 15, 1894; that the petitioner on or about the 6th day of March, 1895, was duly appointed administrator of the estate of said deceased, and gave bond and duly qualified; that an inventory and appraisement bill in said estate had been duly made, filed and approved; that the petitioner had rendered to said County Court a just and true account of the personal estate and debts of said deceased, which had been duly approved; that the personal estate of said deceased amounted to \$90; that the debts and demands allowed against said estate, including widow's award, amounted to \$792.86; that there were just claims to be presented against said estate to the amount of \$600; that there had come to the hands of the petitioner, personal estate to the amount of \$90; that there was a deficiency of personal property to pay the debts of said deceased, which amounted to about \$1,200.

That said William E. Farrell, deceased, died seized of certain real estate in said county of Lake (here follows a description of the real estate described in petition for leave to sell, closing with a statement that the lands described consisted of one hundred forty-three acres, more or less), and then stated that while the legal title to the same was in Thomas Claffy, he, in fact, held said title as a mortgage on which \$2,000 was due, subject to the mortgage of the defendants, Jane E. Shaw and J. A. Moulton, amounting to \$4,000.

*That said deceased left surviving him the defendant, Catherine Farrell, as his widow, having dower and homestead interest in said real estate; and the defend-*

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ants, Edward Farrell and Mary Farrell, as his children, and only children heirs and only heirs at law; and that both of said children were infants under the age of legal majority respectively.

And the court further found that all the things necessary to be done in order to obtain said decree had been regularly done in the manner required by law, and the petitioner having given the bond required by law in a proceeding for the sale of real estate of deceased persons for the payment of debts, in the sum of \$3,500 with surety, to the satisfaction of the court, and that said bond and surety were thereby approved.

That it was theretofore ordered, adjudged and decreed by the court that the petitioner proceed to make sale of the right, title, interest and estate of the said William E. Farrell, deceased, in and to all of the real estate in said decree described; that said sale be made at public auction to the highest bidder for cash, at the east door of the courthouse in the City of Waukegan, County of Lake, and State of Illinois, on such day as the petitioner might appoint between the hours of ten o'clock in the forenoon and five o'clock in the afternoon, and give notice and advertise said sale in the manner required by the statute in such case, made and provided, that upon making such sale he make report thereof to the court, and upon the approval of such report and confirmation of such sale he convey the premises to the purchaser thereof.

The principal error complained of is number 4 of the assignment, and in the brief of plaintiff in error she grounds her argument on the following statement: The real estate which constituted a homestead and which was also subject to dower was sold contrary to the statute and for less than \$1,000, to a party to the proceeding without setting off homestead or dower, and without the consent of the widow filed in the proceeding, as provided by statute. If the premises in question were the premises of deceased, we are of the



opinion, as we stated in passing on the demurrer to pleas, that it was error to decree their sale unless the homestead was waived or assigned in the manner provided by law, which was not done. But we find nothing in the record from which it can be determined that the premises were the homestead estate of the deceased. The land in question is located on several different forty-acre tracts, but adjacent so that it might have been occupied and inclosed, as a farm. There is nothing in the record indicating where the dwelling house may have been located. It does not appear that it was the homestead of deceased except by inference from the allegations in the petition for sale of real estate and the finding in the decree of sale that the widow of deceased had homestead and dower rights in the land. It is quite possible that she had a homestead interest that she did not acquire by her marriage and residence with deceased. This may have been the land of a former husband, and she may have acquired a homestead estate in this land as his widow. In that event, neither William E. Farrel nor his children would have any homestead rights in the premises here in question; but she would have been entitled to a homestead estate notwithstanding her second marriage. *Smith v. Rittenhouse*, 260 Ill. 599. A reasonable assumption and a natural inference from the facts disclosed by the record is that the entire tract of land constituted one farm, inclosed and owned by deceased, that it was worth a few hundred dollars but not exceeding \$1,000, in excess of the mortgage indebtedness of about \$6,000, with which it was incumbered; therefore, if it was the homestead of deceased it could not be sold by his administrator for the payment of his debts. If, however, it was not the homestead of deceased, but was the homestead estate of his wife, the interest of deceased might be sold subject to such homestead estate in this proceeding. The estate of the heir may be levied on and sold for the payment of his debts subject to the home-

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stead estate of the widow of deceased. *Brokaw v. Ogle*, 170 Ill. 115; *Dinsmoor v. Rowse*, 200 Ill. 555. And we assume the estate of any owner of a remainder, subject to a homestead estate of another person, assigned or unassigned, may be subjected to payment of the debts of such owner of the remainder either before or after his death. If the premises in question were not the homestead of William E. Farrel, deceased, in his lifetime, there was no error in decreeing their sale subject to the homestead rights of his widow. The decree recites that proofs both oral and documentary were heard. What those proofs were and what they tended to show we cannot know. The record brought here does not purport to show all the proceedings in the trial court, and contains no certificate of evidence and no other showing of what the proof was. Very likely the evidence was not preserved. It may be that the proof showed the usual condition of homestead in the widow derived from the marriage and residence with her deceased husband, and not the unusual condition of a homestead right in the widow of one man derived from her marriage and residence with another man, as in the case of *Smith v. Rittenhouse*, *supra*. But we are bound to presume the evidence sustained the finding of facts in the decree, unless it appears from the record before us that it did not or could not sustain it. And we should not presume without evidence that something was proven inconsistent with the facts found and the conclusion therefrom in the decree.

It is urged that Thomas Claffy as an individual was not in court. He held the legal title to the land and filed the petition for sale to pay debts as administrator of the deceased. He recited therein the facts required by section 100 of our Administration Act (J. & A. ¶149), including the statement of his interest in the land as an individual. The petition did not follow the form of a bill in chancery in designating parties defendant and praying for summons, but summons was

issued as required by section 102 (J. & A. ¶151), to the widow and heirs and persons holding liens other than Thomas Claffy, and there was filed with the petition a written entry of appearance in the usual form of such entries in chancery suits, signed by Thomas Claffy, containing the title of the cause, naming Thomas Claffy, administrator, as petitioner, and Thomas Claffy, an individual, as one of the defendants. There is no express order of court making him a defendant, but the decree of sale fixes his rights in the property as an individual. We have no doubt he was in court as an individual as effectually as if summons had been issued against him. The character in which he was in court is determined from the body of the pleadings. 31 Cyc. 99; *Kinsella v. Cahn*, 185 Ill. 208. It is quite possible for a person to be in court in a representative and not in an individual capacity, as in the case of *Cleveland v. Cleveland*, 225 Ill. 570, cited by counsel; but nothing in that case, or in any other case that we have been referred to, supports the contention of counsel that Thomas Claffy, as administrator, should have had summons issued and served on himself, or procured from the court some express order making him a party defendant in order to give the court jurisdiction of him as an individual.

It is also contended that Jane E. Shaw, who held the mortgage on the land prior to Claffy's claim, was not in court. It appears from the record that summons was issued for Jane E. Shaw and not served. Her entry of appearance in writing, to which her name is signed by J. A. Holden as her agent, was filed in the case. It is insisted that this appearance did not give the court jurisdiction of her, because there is no proof of Holden's authority to so act as her agent. But the court finds in the decree of sale that she did enter her appearance in the case and does not say on what it bases that finding. We must presume proof was offered of the authority of the agent or that there was

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some other entry of appearance by her that supports that finding. This proceeding in the County Court is aided by every presumption of proofs heard in support of the findings of fact that would prevail if the proceeding was in the Circuit Court. *Barnett v. Wolf*, 70 Ill. 76; *Glos v. People*, 259 Ill. 332.

Plaintiff in error argues that the court erred in allowing certain claims after the date of the sale of real estate. The record does not show when the claims were filed or contain any other data from which we can determine that question.

We are of the opinion that the record of the proceedings in trial court for the sale of land to pay debts discloses no error of that court. The decree is therefore affirmed.

*Affirmed.*

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**Carl Schneeweisz, Appellee, v. Illinois Central Railroad Company, Appellant.**

**Gen. No. 5,938.**

1. RAILROADS, § 615\*—*when no question presented of violation of ordinance requiring automatic bell at crossing.* In an action to recover for personal injuries sustained as a result of a collision between defendant's railroad train and a wagon in which plaintiff was riding at the time of the accident, no question is presented of the violation of a village ordinance requiring the maintenance of an automatic bell at railroad crossings where the ordinance is not in evidence, although there is evidence that such a bell was maintained at such crossing at the time of the accident, but was not in operation.

2. NEGLIGENCE, § 3\*—*what constitutes ordinary care.* Ordinary care, as applied to the conduct of individuals, does not mean the highest degree of care.

3. NEGLIGENCE, § 1\*—*what constitutes.* Negligence is the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the doing of something which a reasonable and prudent man would not do.

4. NEGLIGENCE, § 198\*—*when question for jury whether plaintiff guilty of contributory negligence.* The question whether a plaintiff seeking to recover for injuries alleged to have been sustained as the result of defendant's negligence was himself at the time of the accident in the exercise of the care for his own safety which a reasonable man would exercise under the same or similar conditions is a question of fact for the jury, unless the evidence of a want of such care is so clear that fair-minded men of ordinary intelligence would not differ as to the inferences to be drawn therefrom.

5. RAILROADS, § 250\*—*when presumed jury found that plaintiff acted as a reasonable person would have done in crossing tracks.* In an action where plaintiff recovered a verdict for personal injuries alleged to have been sustained as a result of defendant's negligence, the jury in finding for plaintiff must be presumed to have found that a reasonable man, guided by those considerations which ordinarily regulate human affairs would under similar circumstances have acted as the evidence shows plaintiff acted at the time of the accident.

6. RAILROADS, § 755\*—*when question for jury whether plaintiff crossing tracks while view obscured guilty of contributory negligence.* In an action to recover for personal injuries sustained by plaintiff as a result of a collision occurring at a railroad crossing between defendant's freight train and a wagon in which plaintiff was riding, which collision was alleged to be due to defendant's negligence, and where contributory negligence was relied on in defense, and there was evidence that plaintiff's view of the track in the direction from which such train was approaching was obscured by box freight cars and buildings standing on defendant's right of way; that the ground was frozen and a high wind was blowing which, with the noise of the wagon on the frozen ground, tended to deaden the sound of the approaching train; that an automatic bell was maintained by defendant at such crossing which was not in operation at the time of the accident on which plaintiff might have relied to give warning of the approach of such train; and that, if the whistle and bell on the locomotive of such train were sounded, plaintiff did not hear them, *held* that it was a question for the jury whether plaintiff was guilty of contributory negligence, although plaintiff did not look and listen before crossing the track and there was evidence that had he done so he would have seen the approaching train.

7. NEW TRIAL, § 52\*—*when not allowed because verdict against evidence.* In an action where the evidence presents a question for the jury, a motion for a new trial will not be allowed unless the verdict of the jury was manifestly against the evidence, although

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the trial judge, if sitting as a juror, might not have consented to the verdict sought to be set aside, or, if trying the same case without a jury, might have found differently on the same facts, for the reason that if no verdict of the jury which did not meet the view of the trial judge as to the facts on which the verdict is found is to be accepted, the jury would be useless as a part of the trial.

8. **APPEAL AND ERROR, § 1410\***—*when finding conclusive on appeal.* Although the present method of presenting a stenographic report of the evidence to a court of review has many advantages not possessed in former practice by a brief bill of exceptions, and better enables a court of review to determine the weight of evidence, yet where the trial court and the jury seem to have acted fairly and intelligently in reaching the conclusions sought to be reversed, a court of review has no power to reject such conclusions, although it may seem to such court that if it had acted in the place of such trial court and jury it might have reached a different conclusion.

9. **NEW TRIAL, § 52\***—*when properly denied because verdict not against manifest weight of evidence.* In an action to recover for personal injuries sustained as a result of defendant's negligence, because of a collision between defendant's railroad train and a wagon in which plaintiff was riding, a motion for new trial on the ground that the verdict was against the manifest weight of evidence, *held* properly denied.

10. **RAILROADS, § 695\***—*when declaration sufficiently alleges negligent operation of train at excessive speed.* In an action to recover for personal injuries sustained by plaintiff as a result of a collision occurring at a railroad crossing between a wagon in which plaintiff was riding and defendant's freight train, a count in plaintiff's declaration charging a violation of a village ordinance limiting the speed of such trains to ten miles an hour in that "said defendant then and there ran a freight train on one of its tracks \* \* \* at a speed of \* \* \* thirty miles an hour, down to, upon and across said street and down to and upon said plaintiff," and also a count charging that defendant ran such freight train "down to and over and across said street at a rate of speed exceeding ten miles an hour in violation of said ordinance," cannot be narrowed by construction so as to limit the charge of excessive speed to the space covered by the crossing, and to warrant the objection that the counts were not supported by proof of the excessive speed of the train before reaching the crossing.

11. **RAILROADS, § 737\***—*when evidence sufficient to sustain finding as to rate of speed of train in passing over crossing.* In an action to recover for personal injuries sustained by plaintiff as a result of a collision occurring at a railroad crossing between defendant's

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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freight train and a wagon in which plaintiff was riding, which collision was alleged to be due to defendant's negligence, where plaintiff's declaration charged a violation of a village ordinance limiting the speed of such trains to ten miles an hour, evidence *held* to sustain a finding that the train in question was running at a speed greater than ten miles an hour at the time of the accident.

12. RAILROADS, § 737\*—*when evidence sufficient to sustain finding as to operation of train over crossing at negligent speed.* In an action to recover for personal injuries sustained by plaintiff as a result of a collision occurring at a railroad crossing between defendant's railroad train and a wagon in which plaintiff was riding, where plaintiff's declaration charged negligence in that the speed at which the train in question was being run at the time of the accident was in violation of a village ordinance limiting the speed of such trains to ten miles an hour, evidence *held* sufficient to prove negligence as charged, it appearing that such violation of such ordinance contributed to the injury complained of.

13. TRIAL, § 211\*—*when denial of peremptory instruction on ground of variance properly refused.* In an action to recover for personal injuries sustained by plaintiff as a result of a collision occurring at a railroad crossing between defendant's freight train and a wagon in which plaintiff was riding, where three counts of plaintiff's declaration alleged that defendant's engine struck such wagon and threw plaintiff out causing the injuries for which recovery was sought, and where the fourth count alleged that such injuries were caused by such engine striking plaintiff, the denial of a peremptory instruction for defendant on the ground of variance in that the evidence was alleged to show that plaintiff's injuries were due to falling against such engine after jumping out of such wagon, *held* not erroneous where the motion for such instruction was directed to all the counts and not to each of the counts, the court being unable to allow such motion as to the fourth count, and also for the reason that there was evidence on which the jury might have found the fact to be as alleged in the first three counts.

14. RAILROADS, § 718\*—*when evidence admissible as to rate other trains passed crossing.* In an action to recover for personal injuries alleged to have been the result of a collision occurring at a railroad crossing between defendant's railroad freight train and a wagon in which plaintiff was riding, where the negligence alleged was in part that the train in question was at the time of the accident being run at a rate of speed which was in violation of a village ordinance limiting the speed of such trains to ten miles an hour, *held* not error to permit plaintiff's witnesses to testify that other trains of defendant ran through the village in question at a high rate of speed, it

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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appearing that the testimony objected to was brought out on redirect examination, after defendant had made such witnesses to testify that the two main tracks of defendant at the point where the accident occurred were constantly used by fast moving trains of defendant, most of which did not stop at such village, and where it did not appear that plaintiff sought to emphasize other violations of the ordinance, and that such testimony did not exceed what was required by what defendant brought out on cross-examination, or materially add thereto.

15. APPEAL AND ERROR, § 1238\*—*when party estopped to object that improper subject introduced at trial.* A party cannot on review be heard to object that a subject which such party introduced into the trial was improper.

Appeal from the Circuit Court of Will county; the Hon. FRANK L. HOOPER, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 20, 1915. *Certiorari* denied by Supreme Court (making opinion final).

SNAPP & HEISE, for appellant; W. S. HORTON and J. G. BRENNAN, of counsel.

COWING & KING, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Appellee, Carl Schneeweisz, was on January 29, 1912, riding west in an ordinary farm wagon drawn by two horses driven by one Jacobs, on a public street across the double main track and two switch tracks of the appellant, Illinois Central Railroad Company, in the Village of Peotone, Will county, Illinois. There were two other men in the wagon, Nadler and Deininger. The latter was a stock buyer and grain dealer with his office near by. He had lived there for years, was supervisor of the town, and very familiar with the crossing and the operation of the trains over it. The other three men were all farmers living in the vicinity and were quite familiar with the crossing. The team passed over one switch track and over the northbound main track and the wagon was struck by

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the engine and a long freight train that was moving at a speed from twenty miles an hour seven hundred feet north of the crossing, decreasing to perhaps ten or twelve miles an hour as it reached the crossing. The four men were all standing in the wagon, Jacobs, the driver, and appellee near the front, Nadler and Deininger near the rear. They could, any of them, have seen the train approaching from the north in time to stop the team and avoid the collision, but none of them did see it until the horses were near the southbound track, when they discovered it. Nadler and Deininger jumped from the rear of the wagon, appellee attempted to jump from the side, and it is not clear whether he was out of the wagon when it was struck by the engine. Jacobs remained in the wagon and was thrown with it some distance. Appellee sustained injuries for which he brought this action, and in his declaration, alleging due care on his own part, in different counts charged appellant with negligence; in violating a village ordinance limiting the speed of trains to ten miles an hour; in running at a great and dangerous rate of speed onto and across said highway; in failing to ring a bell or blow a whistle before reaching the street; in allowing box cars and buildings within its control to stand on its right of way obstructing the view; and in violating another ordinance of the village requiring an automatic bell to be operated at the crossing; and charging that appellant had an automatic bell at the crossing that had been before operated but at the time was out of repair and failed to give warning.

A plea of not guilty was filed and a jury trial followed. Appellee failed to get the automatic bell ordinance in evidence, therefore no question of violating that ordinance is presented; though the fact that there was a bell there that had been used and was out of order, and not then in operation, is one of the circumstances to be considered. There was a verdict and judgment for the plaintiff for \$4,000, from which judgment

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this appeal is prosecuted, and a reversal sought mainly on the ground that the evidence fails to show due care on the part of appellee, but on the contrary clearly shows that he was guilty of negligence contributing to his injury. It is also argued that the evidence does not show any act of negligence of appellant charged in the declaration; in other words, it is claimed that it is clear that appellee was not at the time in question exercising that care for his own safety that an ordinarily prudent man would have done under the same or like circumstances, and that appellant was not guilty of the negligence charged. It is urged with great earnestness that the trial court should have directed a verdict for the defendant, if for no other reason, on the ground that it is so clear from the evidence that appellee was not in the exercise of ordinary care for his own safety, that there is no ground for difference of opinion among fair-minded men on that question. The fact that he did not look, as he might, and see the train approaching in time to jump from the wagon in safety, or cause the driver to stop before reaching the track, is pressed upon our attention, and we are referred to a number of cases in this and other courts holding, in substance, that while it cannot be said as matter of law that it is negligence not to stop and look and listen before crossing a railroad at grade, still if under the circumstances ordinary care and prudence requires one to look and listen, then if an injury results that could have been so avoided it is a case of contributory negligence and the plaintiff cannot recover. It is no doubt difficult for the layman or even the lawyer to fix definitely in mind what is meant by ordinary care, due care, etc., as applied to the conduct of individuals. It is clear that it does not mean the highest degree of care. There is a degree of care that would have prevented the accident in this case if appellee had exercised it, and it is difficult to conceive of a pedestrian, or driver of a vehicle, injured by collision on a railway crossing of

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a public highway, where he could not have avoided the injury by the exercise of a high degree of care, to ascertain before he went upon the railroad tracks whether there was a train approaching; yet there are many cases where the plaintiff has been permitted by reviewing courts to maintain his judgment obtained for injuries received under such circumstances. Our Supreme Court has repeatedly defined negligence to be "the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a prudent and reasonable man would not do." *Pittsburgh, Ft. W. & C. Ry. Co. v. Callaghan*, 157 Ill. 406. This means if at any given time and place a plaintiff is exercising that care which a reasonable man would ordinarily exercise under the same or similar conditions, it is all that is required of him. Whether he did measure up to that standard at the time and place in question is a question for the jury unless the facts and circumstances proven are so clear that fair-minded men of ordinary intelligence would not differ as to the inferences to be drawn from them. *Pittsburgh, Ft. W. & C. Ry. Co. v. Callaghan*, *supra*, in which case there is really no question of fact to decide and therefore none to submit to the jury.

There is no claim in this case that either of the four men in the wagon at the time in question was intoxicated. They seem, each of them, to have been normal men; they each testified on the trial of this case, and it would appear from a reading of their testimony that the three farmers in the wagon might any one of them be selected, if there was a search in their community for an ordinarily prudent man, to use as a measure of conduct; and it is quite clear that Deininger, the stock dealer and supervisor, was above the average of mankind, and because of that fact might well have been objected to as a standard of ordinary care and prudence to measure other men by. The claim that appel-

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lee was negligent rests entirely on the fact that he did not look and listen and thus avoid the injury; but they all saw the train at about the same time; the two men standing in the rear of the wagon had, for that reason, a better opportunity to jump out, and they did so in time to avoid serious injury. Appellee seems to have attempted to get out at practically the same time, and, as we have said before, the evidence leaves it in doubt whether he was clear of the wagon before the engine struck it. It is of course possible that each of these four men was at the time and place in question omitting something which a reasonable man would do under the same or similar circumstances, but the fact that four reasonable men did under given circumstances do, and omit to do, certain things, tends in some degree to, at least, the impression that the hypothetical reasonable man, if he had been there at that time and under those circumstances, would have acted as they did; and a consideration of the situation in our opinion affords reason for the conclusion reached by the jury that appellee's conduct was not below the requirement of ordinary care. The east track was a switch track. The next was the northbound main track. The next was the southbound track, on which this train was running. The most western track was a switch track. East of the track and on the right of way north of the street crossing was a place where lumber and other merchandise was piled, and then several coal sheds and then the cattle yards. East of these sheds, but on the right of way, was a traveled way leading from the street north to the coal sheds and the cattle yards. Appellee and the other two farmers had delivered some live stock to Deininger at the cattle yards shortly after noon of that day and Deininger had been there with them. They all got into the wagon at the cattle yards to go to the office, which was south of the cattle yards and west of the tracks. They drove down this roadway to the street and turned west towards the tracks. The

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evidence is contradictory whether there were box cars standing on the switch that would obstruct their view north, but over most of the roadway their view was obstructed by the sheds and they could not get an unobstructed view north on the right of way, much, if any, before turning to cross the tracks; but they could get such a view about thirty feet before reaching the east switch, and sixty-one feet from the southbound track on which they were struck. An automatic bell had theretofore been used by appellant at that crossing to give warning of approaching trains. It is not clear from the evidence when it got out of order, but it was not operated at that time. The men in the wagon were familiar with the crossing and therefore knew that there was a bell there and they may have somewhat relied on that for a warning. The main track nearest to them was the northbound track. They would naturally at first give most attention to the south to see if there was a train approaching on the first track they were to pass over, and they seem to have done so, though Jacobs says he looked north as they were about to turn and saw no train approaching, and appellee says he listened as they approached the crossing and heard no train. There was not a clear view to the south for a great distance, which naturally kept their attention directed that way for a longer time. There was a high wind blowing (there is no doubt of that; it is questioned in one part of appellant's brief and admitted in another part); this, with the sound of the wagon on the frozen ground, tended to prevent their hearing the sound of the approaching train. If the bell of the approaching train was ringing or the whistle blowing (there is a conflict of evidence about that), none of these men heard it, and under the conditions it is likely they might not hear it. Deininger says he discovered the train and called out "jump" and jumped from the wagon taking Nadler with him. Appellee did not hear Deininger call out but saw the train and jumped at

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about the same time. The jury must be presumed to have found that a reasonable man guided by those ordinary considerations which ordinarily regulate human affairs would ordinarily have done as appellee did at that time and place. We have no doubt that the evidence presented a question for the jury to determine, and to be determined by the trial court only in passing on the motion for a new trial. If he was then of the opinion that, had the case been submitted to him on the facts, he would have found otherwise, or that if he had been acting as a juror instead of a judge, he would have refused his assent to the finding, it by no means follows that he should have granted a new trial. If such was the position and duty of the trial judge, and no finding of the jury that did not meet his own views of the facts should be accepted, the jury would become an utterly useless part of the trial. The question before the trial judge was whether the verdict of the jury, involving the finding that appellee was at the time in the exercise of ordinary care, was so manifestly against the evidence that he should submit the question to another jury. He refused to do so, and it is our duty to determine whether he erred in so doing.

Counsel for appellant suggest that the oft repeated statement in the opinions of courts that the jury and trial judge saw the witnesses and heard them testify, and therefore were better able to judge the controverted facts, is grounded in old practice where the bill of exceptions was very brief and perhaps, in fact, unreliable, and that under the present practice, where this court is furnished with a stenographic report of the evidence, the rule should not govern. It is no doubt true that the present method of presenting the evidence to a reviewing court has many advantages that the court can better judge the weight of the evidence than under the old method of presenting an abridgement of the testimony; but reading the words of a witness, or of any narrator of facts, does not place the reader in



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so good a position to judge the truth as if he heard the spoken words and observed the manner of the speaker. This is common knowledge generally recognized by the courts. And even had we seen and heard the witnesses in this case, and felt that, had our duty been that of jurors, we would have found a verdict of not guilty, still it would not follow that we, for that reason alone, should reverse and remand the case. The jury and trial judge were performing duties imposed on them by law in passing on the facts in this case. There was a question that intelligent men might well differ in answering, and if the jury and trial court in our opinion acted fairly and intelligently in reaching their conclusions, we are given no power to reject them merely because it may seem to us that in their place we would have reached a different result. There may be intelligent as well as honest differences of opinion on doubtful questions. We think this record presents a case where we should accept the conclusion of the trial court and jury on the question of ordinary care of appellee.

While appellant seems to urge the question of appellee's care with the most confidence, and it seems to us the difficult question in the case, it is urged also that the evidence does not support any allegation of negligence of the defendant. It is not, and cannot be, questioned that appellant was running its train, approaching the crossing, within the village limits, which were 1,500 feet north of the crossing, at a rate of speed much in excess of ten miles an hour, the limit fixed by the village ordinance. Neither is any question raised as to the validity of the ordinance, but it is said the declaration, in the counts charging violation of that ordinance, alleges that the train was run at the high rate of speed complained of at the crossing in question, and therefore is not supported by proof that it ran at that speed before reaching the crossing. There is conflict in the evidence whether it had slowed down to ten miles an hour or less when it reached the crossing.

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The first and second counts of the declaration each charge violation of this ordinance; in the first it is alleged that "said defendant then and there ran a freight train on one of its tracks from the north at a speed exceeding ten miles per hour, to-wit: thirty miles an hour, down to, upon and across said street and down to and upon said plaintiff," and in the second that "the defendant ran a freight train over one of said tracks from the north down to and over and across said street at a rate of speed exceeding ten miles per hour, contrary to the provisions of said ordinance." It seems too narrow a construction of the language of those counts to limit the charge of excess speed contributing to the injury to the space covered by the crossing. But even were that the necessary construction, and the evidence of the rate of speed before the crossing was reached to be considered only on the question of its speed at the crossing, and on the question of appellee's care in approaching the crossing perhaps on the assumption that no train would approach faster than ten miles an hour, still we are satisfied the jury were warranted by the evidence in finding that the train was running in excess of ten miles an hour at the time of the collision. The engineer and conductor placed the speed at the crossing at nine miles an hour, the fireman at eight to ten miles an hour, the station agent at ten miles an hour, said it might have been eleven miles; another witness called by the defendant placed it at ten or eleven miles an hour. Six or seven witnesses called by plaintiff estimated the speed at fifteen to twenty-five miles an hour. There is also proof of how far the train went after the collision before stopping, and how far the team went after it turned onto the crossing, when witnesses saw both it and the train, and how fast the team was moving; from various of which items of proof counsel for each side figure out with much ingenuity proof of their respective contentions. The familiar argument of

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defendant's that train men are better judges of the speed of trains, and of plaintiff's that train men are not dependable witnesses as to that matter, because they are interested, is pressed upon us by the respective counsel. It will serve no useful purpose to further set out in detail the evidence supporting these contentions; nor is it necessary to discuss the obvious fact that violating the ordinance contributed to the injury complained of. There is in our opinion no cause for disturbing the verdict on the ground that negligence, as charged, was not proven. It is unnecessary to consider the evidence on other charges of negligence of appellant.

It is argued that there is a variance between the declaration and proof, the allegation in three counts being that the engine struck the wagon and threw plaintiff out, whereas it is contended he was out of the wagon before it was struck, and his injuries resulted from his jumping from the wagon and falling or jumping against the engine. This supposed variance was only presented to the trial court in the motions for a directed verdict at the close of the plaintiff's evidence, and of all the evidence. The fourth count of the declaration did not charge that the wagon was struck, but charged plaintiff was struck, therefore the court could not direct a verdict as to that count on that ground, and the motion was directed to all the counts, not to each of them. There was evidence however from which the jury could have found the occurrence as alleged. We see no reversible error on that ground. It is argued that the court erred in permitting witnesses for plaintiff to testify that other trains of appellant ran through the village at a high rate of speed. This testimony came on redirect examination of one of plaintiff's witnesses who had been made to state on cross-examination that the two main tracks were constantly used by fast moving trains of appellant, and that the bulk of the fast trains did not stop in Peotone.

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There was no effort by plaintiff to emphasize the fact of other violations of the ordinance, and nothing proven in that respect not justified by the evidence for which appellant was responsible, or materially adding to the facts shown on the cross-examination. Appellant cannot be heard to object that a subject it introduced was improper. It is not claimed that the court erred in its rulings on the testimony, except as above stated, or that there was error in the instructions to the jury, except in refusing peremptory instructions, or that the verdict is excessive. Appellee assigns cross-errors, and argues that the court erred in its rulings as to the evidence offered under the automatic bell count of the declaration. We find no reversible error assigned by appellant, and conclude the judgment should be affirmed; therefore will not discuss the cross-error further than to say that we are of the opinion the court did not err in its rulings there questioned. The judgment is affirmed.

*Affirmed.*

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**John A. Carlson, Appellee, v. Avery Company,  
Appellant.**

**Gen. No. 6,000.**

1. **APPEAL AND ERROR, § 16\***—*when right of appeal exists.* At law the right to appeal is statutory, and no appeal can be taken from the judgment of a court of inferior jurisdiction unless the statute either expressly or by plain implication provides for an appeal.

2. **WORKMEN'S COMPENSATION ACT, § 13\***—*when no right of appeal to Appellate Court from proceedings by arbitrators.* A proceeding by arbitrators under section 10 of the Workmen's Compensation Act (J. & A. ¶ 5459), providing for the determination by arbitrators of questions of law and fact arising in the application of the act, is not a "suit or proceeding at law or in chancery" within the meaning of section 8 of the Appellate Court Act (J. & A. ¶ 2968), and section

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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91 of the Practice Act (J. & A. ¶ 8628), relating to appeals from final judgments of courts of inferior jurisdiction, but is in the nature of a voluntary arbitration.

3. WORKMEN'S COMPENSATION ACT, § 13\*—*when right of appeal from judgment upon trial de novo in Circuit Court of a proceeding by employee to recover compensation.* A trial *de novo* in the Circuit Court of a proceeding by an employee to recover compensation for personal injuries under the Workmen's Compensation Act (J. & A. ¶ 5449 *et seq.*), on appeal from the finding of arbitrators as authorized by section 10 of such Act (J. & A. ¶ 5459), made by a "suit or proceeding at law or in chancery" within the meaning of section 8 of the Appellate Court Act (J. & A. ¶ 2968), and section 91 of the Practice Act (J. & A. ¶ 8628), providing for appeals from the final judgments of courts of inferior jurisdiction in any "suit or proceeding at law or in chancery," although the proceeding appealed from was not such a suit or proceeding, since in such case the judicial proceeding in which the judgment sought to be appealed from was entered began with the trial *de novo* in the Circuit Court, for the reason that the tribunal entering the finding from which appeal was taken to the Circuit Court being nonjudicial, and the controversy adjudicated belonging to the class of cases of which the Circuit Court has original jurisdiction, the appeal authorized by section 10 of such Workmen's Compensation Act was not strictly and legally such, but was a way provided by the statute instead of or in addition to the forms of proceeding otherwise required to give such jurisdiction to the Circuit Court, and such proceeding having therefore come before such court in the way provided by statute, it had jurisdiction thereof by virtue of its general powers.

4. WORDS AND PHRASES—*proceeding at law or in chancery.* The term "suit or proceeding at law or in chancery" includes only suits instituted and carried on in substantial conformity with the forms and modes prescribed by the common law or by the rules in chancery, and does not include cases instituted and carried on solely in accordance with statutory provisions.

5. WORKMEN'S COMPENSATION ACT, § 12\*—*how trial de novo in Circuit Court on appeal from board of arbitrators should be conducted.* A trial *de novo* in the Circuit Court of proceeding by an employee to recover compensation for personal injuries by appeal from the finding of arbitrators under section 10 of the Workmen's Compensation Act (J. & A. ¶ 5459), should be conducted in accordance with common-law forms or modes as modified by the Practice Act (J. & A. ¶ 8538 *et seq.*), and in accordance with general practice, as the act authorizing the appeal does not prescribe a form of procedure to be observed on the trial of such appeal, in such case and

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it is immaterial that no written pleadings are required in proceedings under the Workmen's Compensation Act (J. & A. ¶ 5449 *et seq.*), as the same is true of other cases of which the Circuit Court acquires jurisdiction on appeal.

6. APPEAL AND ERROR, § 1165\*—*when proceedings subject to review.* Though proceedings in their inception are not according to the course of the common law, yet if they subsequently assume that form, as where they are brought up to another court for trial *de novo* according to the course of the common law, they are subject to review on writ of error.

7. APPEAL AND ERROR, § 1165\*—*what constitutes trial de novo.* A trial *de novo* is a trial anew in the appellate tribunal according to the usual or prescribed mode of procedure in other cases involving similar questions, whether of law or fact.

8. WORKMEN'S COMPENSATION ACT, § 13\*—*when trial de novo in Circuit Court "suit or proceeding at law or in chancery" and appealable.* A trial *de novo* on an appeal to the Circuit Court from the finding of arbitrators under section 10 of the Workmen's Compensation Act (J. & A. ¶ 5459), held to be a "suit or proceeding at law or in chancery," so that an appeal from a final judgment entered therein is secured by section 8 of the Appellate Court Act (J. & A. ¶ 2968), and section 91 of the Practice Act (J. & A. ¶ 8628), relating to appeals from the final judgments of courts of inferior jurisdiction.

9. WORKMEN'S COMPENSATION ACT, § 12\*—*what is proper procedure upon trial de novo in Circuit Court.* As section 10 of the Workmen's Compensation Act (J. & A. ¶ 5459), providing for an appeal from the finding of arbitrators appointed thereunder and for a trial *de novo* in the Circuit Court, does not provide or direct the manner of the trial in the Circuit Court, the provisions of the Practice Act (J. & A. ¶ 8538 *et seq.*), are applicable thereto.

10. TRIAL, § 284\*—*what special verdict must find.* Special verdicts authorized by section 79 of the Practice Act (J. & A. ¶ 8616) must find all the controverted facts on which the judgment is based, and are to be distinguished from special findings which accompany a general verdict, also authorized by such section.

11. TRIAL, § 284\*—*what are requisites of special verdict.* To sustain a judgment entered on a special verdict, such verdict must find all the facts essential to support the judgment and must leave nothing to be decided by the court except questions of law, for which reason the evidence from which a fact might have been found but is not found is without value in such special verdict.

12. TRIAL, § 284\*—*act authorizing special verdicts declaratory of common law.* Section 79 of the Practice Act (J. & A. ¶ 8616)

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authorizing special verdicts is merely declaratory of the common law.

13. TRIAL, § 284\*—*when special verdict finding sufficient evidence prima facie to establish facts not sufficient.* A special verdict finding sufficient evidence *prima facie* to establish the facts essential to sustain the judgment entered thereon is insufficient to sustain such judgment.

14. TRIAL, § 284\*—*when special verdict sufficient.* A judgment based on a special verdict may be sustained if the verdict finds probative facts from which the court can find that the ultimate facts necessary to sustain such judgment necessarily result from the facts found in the special verdict.

15. TRIAL, § 284\*—*special verdict not to be aided by intendment.* A special verdict cannot be aided by intendment, and any fact not ascertained by it will be presumed not to exist.

16. TRIAL, § 284\*—*what findings special verdict must contain.* In civil actions, a special verdict must contain a finding of every material controverted fact necessary to support the judgment which does not appear elsewhere in the record, and, so used, the word "uncontroverted" may include facts essential to support the judgment as to which the evidence may not be controverted.

17. TRIAL, § 284\*—*what facts special verdict need not find.* A special verdict need not find facts which may be otherwise ascertained from the record, as from the pleadings.

18. APPEAL AND ERROR, § 804\*—*when bill of exceptions must contain evidence.* The evidence heard in the trial of an action is not part of the record thereof until made so by a bill of exceptions.

19. TRIAL, § 284\*—*when there cannot be both general and special verdict.* Under section 79 of the Practice Act (J. & A. ¶ 8616), relating to the form of verdicts, a special finding may accompany a general verdict, but there cannot be in the same action both a general and a special verdict.

20. WORKMEN'S COMPENSATION ACT, § 12\*—*when there must be findings of average earnings before and after injury.* Although no written pleadings are required in a proceeding by an employee to recover compensation for personal injuries under the Workmen's Compensation Act (J. & A. ¶ 5449 *et seq.*), there is an issue to be tried as to the difference between the average amount of the earnings of plaintiff before the accident and the average amount plaintiff is capable of earning in some suitable employment after such accident, and this issue requires a finding of his earnings at both such times.

21. APPEAL AND ERROR, § 761\*—*when stipulation of facts not part of record.* A stipulation of facts takes the place of evidence and is

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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not part of the record proper, having no greater force and effect than uncontroverted evidence of the facts stipulated.

22. **WORKMEN'S COMPENSATION ACT, § 12\***—*when evidence insufficient to support finding as to average earning capacity before accident.* In a proceeding by an employee to recover compensation under the Workmen's Compensation Act (J. & A. ¶ 5549 *et seq.*), a stipulation that plaintiff had been employed by defendant as alleged and "had earned and received pay for his services at the rate of \$57 per month," held insufficient to support a finding as to what was his average earning capacity before the accident, such stipulation having no greater force and effect than uncontroverted evidence of such facts, which evidence is insufficient to support such finding.

23. **WORKMEN'S COMPENSATION ACT, § 12\***—*when special verdict permissible.* Whether or not section 4 of the Workmen's Compensation Act (J. & A. ¶ 5452), providing that the compensation recoverable thereunder shall be payable in instalments, prohibits a general verdict in an action to recover such compensation, and renders a special verdict imperative, a special verdict is at least permissible in such an action.

24. **WORKMEN'S COMPENSATION ACT, § 12\***—*how finding in special verdict as to ability to earn stated amount of wages after injury construed.* In a proceeding by an employee to recover compensation for personal injuries under the Workmen's Compensation Act (J. & A. ¶ 5449 *et seq.*), a finding in a special verdict that plaintiff was able to earn a stated amount of wages after the injury sought to be compensated is equivalent to a finding that plaintiff could not earn more than the stated amount at such time.

25. **WORKMEN'S COMPENSATION ACT, § 12\***—*when evidence insufficient to sustain finding as to present earning capacity.* In a proceeding by an employee to recover compensation for personal injuries under the Workmen's Compensation Act (J. & A. ¶ 5449 *et seq.*), evidence held insufficient to support a finding in a special verdict that plaintiff's present earning capacity was \$10 per month.

26. **WORKMEN'S COMPENSATION ACT, § 12\***—*when burden on plaintiff to show earning capacity.* In a proceeding by an employee to recover compensation for personal injuries under the Workmen's Compensation Act (J. & A. ¶ 5449 *et seq.*), where there is evidence that plaintiff still has some earning capacity, plaintiff has the burden of showing what that capacity is.

27. **WORKMEN'S COMPENSATION ACT, § 12\***—*what must be basis of finding in special verdict as to specific earning capacity.* In a proceeding by an employee to recover compensation for personal injuries under the Workmen's Compensation Act (J. & A. ¶ 5449 *et seq.*), where there is evidence that plaintiff still has some earning capacity,

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a finding in a special verdict that such earning capacity is a specific sum per month must be based on some evidence reasonably leading to such a finding.

28. **WORKMEN'S COMPENSATION ACT, § 12\***—*what may be basis of finding of earning capacity.* In a proceeding by an employee to recover compensation for personal injuries under the Workmen's Compensation Act (J. & A. ¶ 5449 *et seq.*), where there is evidence that plaintiff still has some earning capacity, a verdict as to the amount of such capacity may be properly found from plaintiff's evidence, if not controverted, and, if controverted, then on the conclusion of the jury from all the evidence.

29. **WORKMEN'S COMPENSATION ACT, § 12\***—*when question of disability of employee properly submitted to jury.* In a proceeding by an employee to recover compensation for personal injuries under the Workmen's Compensation Act (J. & A. ¶ 5449 *et seq.*), evidence held sufficient to warrant the submission to the jury the question of disability of plaintiff due to the injuries for which compensation was sought.

30. **APPEAL AND ERROR, § 601\***—*how sufficiency of special verdict to support judgment saved for review.* Where the trial court overruled a motion for a new trial made on the ground that the verdict was contrary to the law, which statement was repeated in the assignment of errors, and the denial of the motion and the entry of judgment in accordance with such denial were both assigned as error, the question of the sufficiency of a special verdict to support the judgment entered thereon was saved and presented for review.

31. **WORKMEN'S COMPENSATION ACT, § 7\***—*when employee may recover compensation from time of incapacity to end of period.* Under the Workmen's Compensation Act (J. & A. ¶ 5449 *et seq.*), an employee who is injured at a given date, but not then partially incapacitated from his usual employment, and at any time thereafter during the period provided by the act becomes incapacitated as the result of the injury, may recover compensation from the time of such incapacity to the end of the period, although, after the injury and up to the time of such incapacity by reason of such injury, such employee works and receives wages at such employment.

32. **WORKMEN'S COMPENSATION ACT, § 7\***—*when wages received after injury should not be deducted in fixing amount of disability payments.* Where the employee's compensation for personal injuries under the Workmen's Compensation Act (J. & A. ¶ 5449 *et seq.*), is computed from a date six months after the injury as the time when the disability compensated commenced, amounts received for wages during the period intervening between the time of the accident and the time of the commencement of the injury resulting therefrom

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are not "payments, allowance or benefit which" an employee may receive "from the employer during the period of his incapacity," within the meaning of section 5 of the Act (J. & A. ¶ 5453), providing for the allowance of such payments in fixing the amount of disability payments recoverable under the act, the application of the section being limited to payments and allowances made because of the injury and incapacity resulting therefrom, and excluding from its meaning compensation for labor performed.

33. WORKMEN'S COMPENSATION ACT, § 7\*—*when payments made to employee should be deducted in fixing amount of compensation.* In computing the amount of compensation due to an employee for personal injuries under the Workmen's Compensation Act (J. & A. ¶ 5449 *et seq.*), an employer is entitled under section 5 of the Act (J. & A. ¶ 5453) to allowance for any payments made to the employee on account of his injury and the incapacity caused thereby.

Appeal from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed October 20, 1915.

McROBERTS, MORGAN & ZIMMERMAN, for appellant.

L. O. EAGLETON and WEIL & BARTLEY, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

John A. Carlson, the appellee, was on June 24, 1912, in the employ of Avery Company, the appellant, as night watchman, and had been so employed for the year immediately prior thereto, and had earned and received pay for such services at the rate of \$57 per month. Both parties had accepted the provisions of the Workmen's Compensation Act of June 10, 1911, in force May 1, 1912 (J. & A. ¶ 5449), and were working under that act June 24, 1912. (It is not the act now in force.) At that date appellee claims to have received an injury in the course of his employment for which he is entitled to be compensated under the provisions of that act. There was an arbitration as provided by section 10 of the Act (J. & A. ¶ 5459), and an appeal by the Avery Company from the award of the arbitrators to the Circuit Court of Peoria county,

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under a provision in that section authorizing an appeal and directing that "upon such appeal the questions in dispute shall be heard *de novo*, and either party may have a jury upon filing a written demand therefor with his petition." A jury trial resulted in a verdict as follows:

"Peoria, Ill., March 21st, 1914.

"We, the jury, find that the claimant, John A. Carlson, was injured on the 24th day of June, 1912, while in the course of his employment, with the defendant Avery Company, and that because of such injury he has been partially and permanently incapacitated from pursuing his usual and customary line of employment, and that from the 21st day of December, 1912, he earned or was able to earn or is now earning or is able to earn the average sum of \$10.00 per month in some suitable employment or business."

The court after overruling appellant's motion for a new trial entered judgment as follows:

"It is therefore considered and adjudged by the Court that the claimant John A. Carlson do have and recover of and from said defendant Avery Company, a corporation, the sum of Twenty-three and 50/100 (\$23.50) Dollars for each and every month after the 21st day of December, A. D. 1912, and on the 21st day of each and every month thereafter for a period of time ending June 24th, A. D. 1920, said amount being one-half ( $\frac{1}{2}$ ) the difference between the average amount which the claimant earned before the accident in question in this case, and the average amount he is now able to earn in some suitable employment or business as found by the verdict of the jury, and also his costs and charges by him about this suit in this behalf expended and that execution issue therefor."

From which judgment this appeal is prosecuted.

It is to be observed that the judgment is based on the difference in appellee's earnings before the accident and what he is able to earn since the accident, and

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that there is no finding in the verdict of what his average earnings were before the accident.

Appellee has entered a motion to dismiss the appeal, contending that no appeal lies from the judgment of a Circuit Court on a hearing under the provisions of said Workmen's Compensation Act. We took the motion with the case and it is to be first considered. It is true that the right to appeal at law is statutory. Unless the statute expressly or by plain implication provides for an appeal from the judgment of a court of inferior jurisdiction none can be taken. The court said in *Drainage Com'rs of Town of Niles v. Harms*, 238 Ill. 414, on page 418: "The general rule that a right to an appeal is purely statutory has been settled beyond controversy." Provision is made in section 8 of the Appellate Court Act (J. & A. ¶ 2968) for appeals from the final judgments of Circuit Courts "in any suit or proceeding at law, or in chancery"; and in section 91 of the Practice Act (J. & A. ¶ 8628), appeals to Appellate Courts are authorized, and the same limiting words "any suit or proceeding at law or in chancery" are used. We know of no other statute governing the question, and therefore assume that the inquiry is whether the trial in the Circuit Court was in a suit or proceeding at law or in chancery. The proceeding and trial by arbitrators under the provisions of the act was not a suit or proceeding at law or in chancery, but was in the nature of a voluntary arbitration. *Deibeikis v. Link-Belt Co.*, 261 Ill. 454. Yet the trial in the Circuit Court may have been such a proceeding. That court obtained jurisdiction by an appeal from a nonjudicial body, or accurately speaking it acquired jurisdiction, not by an appeal in a legal sense, but in a way provided by statute, which way is instead of, or in addition to, the forms of proceeding otherwise required to give jurisdiction. The controversy belongs to a class of cases in which the court has original jurisdiction, and being before the court in the method prescribed by the

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statute the court had jurisdiction by virtue of its general powers, and the judicial proceeding began with the presentation of the case in the Circuit Court. *Conover v. Gatton*, 251 Ill. 587, and cases there cited; and *Rowand v. Little Vermilion Spec. Drain. Dist.*, 254 Ill. 543. The court said in *Myers v. Newcomb Spec. Drain. Dist.*, 245 Ill. 140, on page 146: "The term 'suit or proceeding at law or in chancery' only includes suits instituted and carried on in substantial conformity with the forms and modes prescribed by the common law or by the rules in chancery," and adds that it does not include cases which are "instituted and carried on in conformity with forms and modes not according to or recognized by the common law or rules of chancery but solely in accordance with statutory provisions." The Workmen's Compensation Act in question provides for an appeal to the Circuit Court, or when the language is legally considered, provides if either party is not satisfied with the result of the arbitration he may have a trial *de novo* in that court. The act does not prescribe the form or method of proceeding in the Circuit Court, and therefore we assume that court having acquired jurisdiction should proceed with the trial in accordance with common-law forms or modes as modified by the Practice Act and in accordance with the general practice. Written pleadings are dispensed with, but that is true of other cases of which the Circuit Court acquires jurisdiction by appeal and tries the case *de novo*, as for instance trials on appeal from judgments of justices of the peace. The Supreme Court said in *Grier v. Cable*, 159 Ill. 29: "There can be no doubt that the Circuit Court, being a court of general original jurisdiction, is vested by law with jurisdiction of the subject-matter of suits against executors to recover claims against the estates of testators"; and considered whether the suit in the Probate Court was a proceeding at law or in chancery and concluded that it was not, but that it was a purely statu-

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tory proceeding; but the court seems to have made no question of the jurisdiction of the Appellate Court to review the judgment of the Circuit Court rendered on an appeal from the judgment of the Probate Court; and we believe it is generally understood by the profession that while a trial in the County Court on a contested claim against an estate of a deceased person is not a suit or proceeding at law or in chancery, yet an appeal lies from the judgment of the Circuit Court rendered there in a *de novo* trial, and this view is supported by the opinion of the court in *Zeigler v. Illinois Trust & Savings Bank*, 245 Ill. 180. It is said in 2 Cyc. 514: "Though proceedings are not in their inception according to the course of the common law, yet if they subsequently assume that form, as where they are brought up to another court for trial *de novo* according to the course of the common law, they become subject to review by writ of error." It is said in *Lewis v. Baca*, 5 N. M. 289 (21 Pac. 393), that a trial *de novo* "means a trial anew in the appellate tribunal, according to the usual or prescribed mode of procedure in other cases involving similar questions, whether of law or fact." This definition is adopted in Words & Phrases, vol. 8, page 7108, with other definitions not inconsistent therewith. We are of the opinion that the trial in the Circuit Court was in a suit or proceeding at law and therefore the right of appeal to this court is secured by the statute, and the motion to dismiss the appeal is denied.

The manner of trial in the Circuit Court not being prescribed or directed by the Workmen's Compensation Act, the provisions of the Practice Act are applicable. *Fergus v. Garden City Mfg. Co.*, 71 Ill. 51. Special verdicts are authorized by section 79 of the Practice Act (J. & A. ¶ 8616); but special verdicts must find all the controverted facts on which the judgment is based, and are to be distinguished from special findings accompanying a general verdict, authorized by the



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same section of the Practice Act. *Elgin City Ry. Co. v. Salisbury*, 162 Ill. 187; *Perdue v. Big Four Drain. Dist.*, 117 Ill. App. 600. The facts declared by the verdict constitute the basis of the judgment. 38 Cyc. 1868. A special verdict to sustain a judgment should find the facts essential to support the judgment. 23 Cyc. 776. The evidence from which a fact might have been found, without any finding of the fact itself, is valueless in a special verdict. *Seabright v. New Jersey Cent. R. Co.*, 72 N. J. L. 8 (60 Atl. 64). The statute authorizing special verdicts is merely declaratory of the common law. The rules of law governing them are said in *Chicago & N. W. Ry. Co. v. Dunleavy*, 129 Ill. 132, to have been long settled; the authorities are there cited and discussed, and it is there said on page 142: "They should find facts, and not the mere evidence of facts, so as to leave nothing for the court to determine except questions of law." (Citing authorities.) "To authorize a judgment upon a special verdict, all the facts essential to the right of the party in whose favor the judgment is to be rendered, must be found by the jury; finding sufficient evidence, *prima facie*, to establish such facts, is not sufficient." (Citing authorities.) "If probative facts are found from which the court can declare that the ultimate facts necessarily result, the finding is sufficient." (Citing authorities.) "A special verdict cannot be aided by intendment, and therefore any fact not ascertained by it will be presumed not to exist." (Citing authorities.) In civil actions a special verdict "must contain a finding on every material controverted fact to support a judgment." Encyc. Pl. & Pr., vol. 22, page 984. This statement in words or substance is often repeated in cases dealing with the question. Many cases are cited by the author of the above quoted text in support thereof, and the word "controverted" should perhaps be read into the statements quoted from our own Supreme Court. But what does that word mean? The same

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author says on page 987 of the same volume: "A special verdict need not find facts admitted by the pleadings," and adds that according to some cases it need not when there is no conflict in the evidence. Only Wisconsin cases are cited in the note to the second proposition; and while that construction may be placed on the word "controverted" by the Supreme Court of Wisconsin, we do not think it the general rule or one that we should follow in the light of the language of our Supreme Court above quoted. Very likely a special verdict need not find facts that can otherwise be ascertained from the record proper. The pleadings are a part of the record; the evidence is not, until made so by the bill of exceptions. Special findings may accompany a general verdict under the provisions of section 79 (J. & A. ¶8616) but there cannot be a general and a special verdict in the same case.

In the case at bar there was, as we have seen, no written pleadings, but there were issues to try, and one of them was as to the difference between the average amount which the claimant earned before the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident, and this issue requires a finding of his earnings at those times. A stipulation was filed in the case as follows:

"It is stipulated by the counsel for claimant and defendant that on June 24th, 1912, both had accepted the provisions of the Workmen's Compensation Act of June 10th, 1911, in force May 1st, 1912, and that both were working under the Act on June 24th, 1912, and that claimant had been in the employ of defendant as night watchman for the year preceding June 24th, 1912, and had earned and received pay for his services at the rate of \$57.00 per month, payable semi-monthly on the 5th and 20th days of each month."

It is urged by appellee that the facts there stipulated were not "controverted" and therefore that the spe-

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cial verdict need not find them. The stipulation takes the place of evidence. It is not a part of the record proper. *Raymer v. Modern Brotherhood of America*, 157 Ill. App. 510. We do not see how it can have more force and effect than would uncontroverted evidence of the facts stipulated, which we have before said we do not regard sufficient. It is quite likely that the stipulated fact, that the parties were under the Workmen's Compensation Act, might be learned from other parts of the record proper, and therefore its finding omitted in the special verdict, though it would have been safer to incorporate it therein, but there was nothing in the record proper from which claimant's earnings before the accident could be found.

Appellee in support of his motion to dismiss the appeal says that the provision in the Workmen's Compensation Act for compensation to be paid in instalments, in effect, forbids a general verdict, and appellant in its reply does not controvert that statement. We are therefore not aided by briefs of counsel to determine whether a special verdict was imperative, but we see no reason why it is not permissible.

Appellee quotes the language of the court in *Vincent v. Morrison*, Breese (1 Ill.) 227, indicating that even though the verdict is insufficient, if this court is satisfied the claimant should recover the amount of the judgment the case should not be sent back for another trial that would result only in costs without benefit to the parties. We would give the suggestion more careful consideration if we were satisfied with the verdict in all respects except its failure to find the facts stipulated. We regard it doubtful whether claimant's incapacity is the result of the accident complained of, and we see no sufficient foundation for the finding in the verdict that he is able now to earn \$10 a month, which means that he is not able to earn more than that sum. It is clear from the evidence offered by the claimant that he has some earning capacity; and to support a

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verdict that depends upon the definite finding of what that capacity is, there should be more satisfactory evidence than the record contains, and the burden is upon the claimant to produce such evidence. It is true that he might introduce evidence showing he had no earning capacity, or that it was any sum he might claim, and the verdict would properly be found on that evidence, if not controverted, and if controverted then on what the jury might conclude from all the evidence, but the finding of a specific sum must be based on some evidence that would reasonably lead to that finding.

Much of appellant's brief and argument is devoted to the contention that the evidence does not support any finding of injury and consequent disability of the claimant. There was in our opinion sufficient evidence tending to support that claim to require a submission of the facts to the jury.

Appellee says the question of the sufficiency of the verdict to support the judgment is not saved for review, either in the motion for a new trial or in the assignment of errors. In the written motion for a new trial one reason assigned is: "The verdict is contrary to the law." This is repeated in the assignment of errors. It is also assigned as error that the court erred in overruling the motion of defendant for a new trial, and in rendering judgment against the defendant. And appellant in its brief says the verdict was bad in substance. We regard the question saved and presented for our determination.

The jury found that the claimant was partially and permanently incapacitated, etc., by his injury of June 24, 1912, and that from the 21st of December, 1912, he was able to earn \$10 per month. The judgment is based on the theory that the limit of the recovery is eight years from the date of the accident, but that the computation of the difference in earnings begins December 21, 1912, about six months after the accident. The evidence shows that during this six-months' period

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the claimant worked for the defendant at his usual employment, and received for that work \$333.85. For that reason the jury did not find that his incapacity to earn his usual wages dated from the time of the accident. This raises the question whether an employee injured at a given date and not at that time partially incapacitated from pursuing his usual customary line of employment, but afterwards, during the eight-year period, whether six months or six years after the accident, becoming so incapacitated as the result of the injury, is entitled to recover from the time of his incapacity to the end of the eight-year period. The trial court held that he was, and in the absence of any authority on the construction of the statute in that respect, we are inclined to the same opinion.

Our attention is called to the provision in section 5, clause 3, of the Act (J. & A. ¶ 5453), providing: "In fixing the amount of the disability payments, regard shall be had to any payments, allowance or benefit which the employee may have received from the employer during the period of his incapacity, except the expenses of necessary medical or surgical treatment"; and it is claimed that in disregarding the six months that claimant worked for the defendant, and the amount paid him for such work, after the accident, the court deprived the defendant of its rights under that provision of the statute. If the court was right in fixing compensation from the date of the disability and not from the date of the accident, it seems unimportant for whom the claimant worked or from whom he received compensation for such work, during the time intervening between the date of the accident and the date of the resulting disability. If payments were made, not in compensation for labor, but because of the injury and incapacity, the defendant would be entitled to the benefit of that provision of the act.

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For the reasons above stated, the judgment is reversed and the cause remanded for another trial.

*Reversed and remanded.*

MR. JUSTICE NIEHAUS took no part.

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**Lizzie Apitz, Appellee, v. Supreme Lodge Knights  
and Ladies of Honor, Appellant.**

**Gen. No. 6,007.**

1. DEATH, § 6\*—*when death may be presumed before lapse of time ordinarily required.* The presumption of fact which will justify the conclusion of death before the lapse of time required for the legal presumption of the death of an absentee must arise from specific evidence of circumstances tending to show such death.

2. EVIDENCE, § 23\*—*when not presumed that Supreme Court names all conditions under which a stated rule will apply.* Where a decision of the Supreme Court names certain circumstances under which a stated rule of law will apply, it is not to be presumed that all the conditions under which such rule would apply are therein named, but that a class of evidence is intended to be described which would warrant the application of the rule.

3. DEATH, § 2\*—*when presumed to have occurred at end of seven years.* Where there is no specific evidence tending to show the death of an absentee before the expiration of seven years from the date of his disappearance, the death of such absentee is presumed to have occurred at the end of seven years from the date of such disappearance precisely as if there were positive evidence that such absentee died on the last day of such seven-year period.

4. INSURANCE, § 794\*—*when by-law providing for suspension not waived by acceptance of assessments.* In an action to recover on a certificate of insurance issued by a fraternal benefit society, where plaintiff was the beneficiary named in such certificate, and a by-law of defendant society provided that upon disappearance of insured and failure to reappear within one year from the date of such disappearance insured should stand suspended, and such disappearance took place November 7, 1905, the acceptance by defendant of the assessment for the month of November, 1906, held not a waiver of its rights under the by-law, it appearing that such assessment became payable before the expiration of one year after such disappearance.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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5. **INSURANCE, § 747\***—*when members of benefit society bound by subsequently enacted by-laws.* After-enacted by-laws of a fraternal benefit society will bind its members when the contract so provides, so as to change such contract in accordance with such subsequent by-laws.

6. **INSURANCE, § 747\***—*when after-enacted by-laws of benefit society not invalid.* After-enacted by-laws of a fraternal benefit society which forfeit claims for the death of a member in certain cases are not in and of themselves invalid as being unreasonable.

7. **INSURANCE, § 747\***—*when benefit society no power to take away its power to adopt by-laws in future.* A fraternal benefit society cannot by a by-law or by a constitution having only the force of a by-law take away its inherent power to adopt in the future such other by-laws as its charter permits, although such after-enacted by-law may change the manner of adopting by-laws and thereby affect the obligation of the contract.

8. **INSURANCE, § 747\***—*what subsequently enacted by-laws included in contract.* The contract of a member of a fraternal benefit society to be bound by after-enacted by-laws, *held* to mean such by-laws as may be legally enacted either in the manner provided at the date when such member became such or in some other legal manner thereafter provided.

9. **INSURANCE, § 887\***—*when subsequently enacted by-law admissible.* In an action by the beneficiary named in a fraternal benefit certificate, conditioned on the conformance by the member with rules and usages of the society issuing the certificate "now in force or which may hereafter be adopted by the same," the admission in evidence of a by-law adopted after the date when the member became such, *held* not erroneous.

10. **EVIDENCE, § 287\***—*when foundation for admission of documentary evidence need not be laid.* Although there are certain requisites to be observed in the passage of a valid law, by-law or municipal ordinance, yet preliminary proof in detail that such requisites were observed in a particular case is not usual necessary to the competency of the law, by-law or ordinance, especially where the admission in evidence of such law, by-law or ordinance is not objected to on the ground of the want of such requisites, and where the officers and records whereby to prove the observance of such requisites are in court, so that if objection to the evidence is made on that ground, proof may readily be made as to the manner in which such law, by-law or ordinance was passed, if thought necessary by the court.

11. **INSURANCE, § 741\***—*when contract not governed by law of state in which benefit society originally incorporated.* In an action

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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to recover on a certificate of insurance issued by a fraternal benefit society, where plaintiff is the beneficiary named in such certificate, it is immaterial that a by-law of such society is void under the laws of Kentucky, although it appears that such society was originally incorporated in such State, it appearing that subsequently such society was incorporated in Indiana, which Indiana corporation thereupon took over the obligations of the former Kentucky corporation, and thereafter issued in this State the certificate sued on after becoming qualified to business therein, and such society later incorrectly stated in its annual report to the insurance superintendent of this State that it was organized under the laws of Kentucky.

12. **INSURANCE, § 913\***—*when submission of question of time of death of insured to jury substantial error.* In an action to recover on a certificate of insurance issued by a fraternal benefit society, where plaintiff was the beneficiary named therein, the submission to the jury of the question of the time of the death of the insured *held* substantial error, where under the evidence insured was presumed to have died seven years after his disappearance, and where under a valid by-law of defendant society insured stood suspended one year after such disappearance, so as to preclude a recovery.

13. **INSURANCE, § 793\***—*when limitation in by-law of time within which action may be brought not waived.* In an action to recover on a certificate of insurance issued by a fraternal benefit society, where plaintiff was the beneficiary named in such certificate, which action was commenced more than seven years after the disappearance of insured, a by-law of defendant society limiting the time within which an action may be brought on such certificate to one year after the death of insured, *held* not waived by the passage of a later by-law providing that in case of such disappearance the beneficiary named therein might continue payment of assessments for one year after such disappearance, and also by receiving from such beneficiary payment of such assessments thereunder, for the reason that such later by-law merely gave the beneficiary such right in order to avoid the suspension of insured for nonpayment of such assessments, and also because such beneficiary was under no obligation to make such payments, and did so at the risk of losing the amount so paid if insured did not reappear within that year.

Appeal from the Circuit Court of Winnebago county; the Hon. ARTHUR H. FROST, Judge, presiding. Heard in this court at the April term, 1915. Reversed with finding of facts. Opinion filed October 20, 1915.

CARPENTER & ST. JOHN and ASHCRAFT & ASHCRAFT,  
for appellant; EDWIN M. ASHCRAFT, of counsel.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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**Apitz v. Supreme Lodge K. and L. of Honor, 196 Ill. App. 278.**

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**ROY F. HALL**, for appellee.

**MR. JUSTICE CARNES** delivered the opinion of the court.

Lizzie Apitz, the appellee, was the wife of August F. Apitz and the beneficiary named in a benefit certificate issued to him December 29, 1894, by the appellant, Supreme Lodge Knights and Ladies of Honor, a fraternal benefit association. August F. Apitz disappeared from his home November 7, 1905, and this suit in assumpsit was brought on said certificate September 23, 1913, and a declaration filed charging, in one count, his death on the date of his disappearance, in another count, at the end of seven years from that date, and in another count, that he had been unaccountably absent for more than seven years and therefore was presumed to be dead, and that the date of his death was within one year from November 7, 1905. The defendant filed the general issue with notice of special defense under by-laws of the company limiting the time within which suit should be brought, and providing for suspension of a member who should disappear. A jury trial resulted in a general verdict for plaintiff for \$1,480, and a special verdict finding that Apitz died within one year from November 7, 1905, the date of his disappearance. The court overruled a motion for judgment for defendant on the special verdict, and the defendant's motion for a new trial, and after requiring plaintiff to remit excessive interest, rendered judgment for \$1,045, from which this appeal is prosecuted.

The by-laws upon which the defense is grounded were as follows:

"Sec. 3. No suit shall be commenced, and no claim against this Order, based upon a Relief Fund Certificate issued to a member thereof, or upon membership, or alleged membership therein shall be paid after the expiration of one (1) year from the date of the death of such member, except in settlement of a judgment of

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a court in an action, or a suit commenced within one (1) year after the right of the claimant or beneficiary named in such Relief Fund Certificate, or who may be a beneficiary under the laws of this Order, shall accrue. All Relief Fund Certificates shall have printed or stamped on the face thereof, notice of the foregoing limitations. As to Relief Fund Certificates now in force, the publication and promulgation of this law shall be sufficient notice of said limitation.”

“Sec. 9. It shall be the duty of a Relief Fund member of the Order to notify the Secretary of his Lodge of any permanent change of residence, and, as far as practicable, to keep the Secretary advised of his post-office address. If any such member shall so fail, and shall change his residence or usual place of abode, or shall disappear from the place or neighborhood in which he shall have usually resided, and his residence shall not be known to his family or to the Secretary of his Lodge, and cannot be ascertained after reasonably diligent inquiry and such disappearance shall be continued for one year, such member shall stand suspended as in case of suspension for the nonpayment of assessments, or dues, and the Financial Secretary of his Lodge shall not receive the assessment or dues from any person. If such member shall reappear and shall make known his place of abode, and shall desire to become reinstated, he may avail himself of the privilege of the reinstatement law of the Order by complying with the requirements of the same within the time required, as in case of the reinstatement of members suspended for nonpayment of assessments or dues.”

There was a by-law in force providing if a member did not pay his assessments during the month for which it was made he should stand suspended, and if he died before being reinstated no moneys should be paid on the benefit certificate. There is no conflict of evidence. It appears that Apitz was of German birth

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and forty-one years of age when he disappeared; that he kept a small grocery store in Chicago; was in good health, mentally and physically, possessed of all his faculties. He had a wife and four children and appeared to be much attached to them. He had no business troubles so far as known and no reason is known, or even suggested, for his disappearance. He paid his November assessment four days before he disappeared, and on the day of his disappearance he went to the secretary of the lodge again and paid his assessments in advance for December and January, and on the same day visited other parties from whom he bought goods and paid them what he owed them. He was domestic in his habits; his wife and family lived in the building where he kept his little store and he was seldom away from them. He left home about noon and was never seen or heard from by his family afterwards. The last known of him was two or three hours after he left home, when he called on some one with whom he had dealings. Relatives of the family lived in Chicago and the vicinity and no friend or relative whom he would have been likely to visit lived elsewhere. The only indication that he intended to go away from home at all is furnished by the fact that he was settling with his creditors, and paying his benefit assessments in advance; but he was not dressed as he presumably would have been if he had intended an absence of a few days, and he probably had no considerable amount of money with him. There were many people interested in him and in his family, and intelligent, diligent search and inquiry seems to have been promptly and persistently made without producing any clue whatever, or disclosing any material facts, other than those above stated, to show where he was or why he left home. Appellee paid the benefit assessments for one year, or until and including November, 1906, when she was notified that they would not longer be received. The assessment for each month was pay-

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able on or before the last day of the month, therefore this assessment was payable November 1st, within a year of the date of the disappearance, but might have been deferred until November 30th, which was a year and twenty-three days from that date. Under section 9 of the by-laws above quoted, Apitz could not be suspended before November 7th, and it is not claimed that the November assessment was paid after that date.

The first inquiry is, when did Apitz die? And we are of the opinion that the special finding of the jury that he died within a year from the date of his disappearance cannot be sustained by the admitted facts. A similar question was before this court in *Dickinson v. Donovan*, 160 Ill. App. 195; and we affirmed a decree which rested on a finding that a person who had disappeared died before the expiration of the seven-year period. There was quite as much reason to suppose that he died during the first part of that period in the admitted facts of that case as there is in this case. The Supreme Court reversed the judgment of this court and the decree of the Circuit Court, and remanded the cause to the Circuit Court with directions to proceed on the presumption of death at the end of the seven-year period. (*Donovan v. Major*, 253 Ill. 179.) The court said: "The presumption of fact which will justify the conclusion of death before the lapse of the time required for the legal presumption must arise from evidence of circumstances tending to show death. That the absentee was exposed to some specific peril; that he sailed in a vessel which had never been heard from, though many months overdue; that he was last seen as a passenger on an ocean steamer in mid ocean, at night, and was never seen or heard of afterwards, though diligent search was made the next morning; that he made threats to commit suicide prior to his disappearance; that the condition of his health was desperate; that he was afflicted with some disease likely

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to undermine his constitution.” While it is not to be presumed that the court named all the conditions that should be considered in determining whether death occurred before the expiration of the seven-year period, it must be taken as expressing a class of evidence that must be present to justify such a conclusion, and as holding that a finding of such earlier death cannot be supported on such evidence as this record discloses. We regard this case as controlling, and the reasons and authorities so fully discussed that we need not refer to other authorities.

We are of the opinion that under the admitted facts it must be assumed that Aplitz died November 7, 1912, seven years from the date of his disappearance, and the case considered the same as if there was positive evidence that he died on that date. The trial court instructed the jury that if Aplitz did not die within one year from the date of his disappearance their verdict should be for the defendant, which instruction was in our opinion correct as applied to the admitted facts. Aplitz disappeared November 7, 1905, and stood suspended after November 7, 1906, under section 9 of the by-laws; therefore there can be no recovery in this case if that by-law applies, unless it be held that appellant by accepting the assessment for November, 1906, waived its provisions; and we are of the opinion that the assessment being payable before the expiration of one year, appellant did not by accepting it waive any of its rights under that by-law.

But it is urged that the by-law does not apply because it was enacted in September, 1905, several years after the certificate was issued to Aplitz. His contract was conditioned upon his conforming “in all respects to the laws, rules and usages of the Order now in force or which may hereafter be adopted by the same,” and provided that in case of his suspension from the Order he should forfeit the rights of himself and his family to all benefits and privileges therein. After enacted

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by-laws bind members of fraternal benefit societies when the contract so provides, and their contracts may be changed by such subsequent by-laws. *Royal Arcanum v. McKnight*, 238 Ill. 349, and cases there cited. We see no reason for holding the by-law unreasonable. A subsequently enacted by-law forfeiting claims for death of a member of a benefit society from suicide was held binding and reasonable in *Supreme Lodge K. of P. v. Kutscher*, 179 Ill. 340; and the law reaffirmed in *Murphy v. Nowak*, 223 Ill. 301.

Appellee claims the court erred in admitting this by-law in evidence over her objection, but no cross-error is assigned. Appellant introduced in evidence a printed pamphlet, containing this by-law, proved to be one of a great number of pamphlets in general circulation among its members; and also made proof by the certificate of its secretary, and also by a copy examined and sworn by a credible witness, in attempted compliance with sections 15, 16 and 18 of our statute on evidence and depositions (J. & A. §§ 5532, 5533, 5535).

But appellee says that the clause in the application for membership binding Apitz by after enacted by-laws must be read in connection with a provision in the then existing by-laws, that the by-laws could be amended only at a regular meeting of the Supreme Lodge by a vote of two-thirds of its members present; therefore Apitz's contract was only to be bound by future by-laws enacted in that manner, i. e., that the contract may be construed to give appellant authority to repeal existing by-laws or enact new ones affecting its obligation to the insured as it existed at the time of the contract, but that it cannot be construed to authorize appellant to change a by-law providing the manner in which by-laws are to be enacted; that this by-law is a part of appellant's defense and the burden was on it not only to prove its enactment, but also to prove that it was enacted in the manner provided at



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the time the contract was made, and there being no evidence that it was passed by two-thirds majority it was not admissible as a defense. The Appellate Court of the Third District in *Supreme Lodge K. of P. v. Kutscher*, 72 Ill. App. 462, rendered a decision and used language in reference to a future enacted by-law that lends support to appellee's contention here. But that case was reversed by the Supreme Court in *Supreme Lodge K. of P. v. Kutscher*, 179 Ill. 340, before cited, and it was there held that a benefit society could not by a by-law or by its "constitution," which has only the force and effect of a by-law, take away the inherent power to, in the future, adopt such other by-laws as the charter permits. We think it follows on the authority of that case and the authorities cited by that court in its opinion that the contract of a member, to be bound by future enacted by-laws, means such by-laws as may be legally enacted, whether in the manner provided at the date of his membership or in some other legal manner thereafter provided. The court did not err in admitting the by-laws in question in evidence.

But if the law should be as appellee contends, still she should not be permitted to here maintain her judgment merely because there was no proof offered that the by-law in question was passed by a two-thirds vote. That question was not raised in the trial court. No objection to the introduction of the by-laws in evidence was made on that ground. Officers and records of appellant were present at the trial, and had the question been raised proof could have been readily produced, if the trial court thought it necessary, of the manner in which the by-law was enacted. There is nothing in the record to indicate any change in the requirements for passing valid by-laws after the date of Apitz's contract, and the by-law in question was quite likely passed in the manner then required. There are always certain requisites to the passing of a valid

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law, by-law or municipal ordinance, but preliminary proof in detail that they were observed is not usually necessary to their introduction in evidence

Appellee claims that appellant is a Kentucky corporation and that under the law of Kentucky this by-law is void. There appears to have been an organization under a private act of the Legislature of Kentucky in 1878. In 1885 a charter was obtained under the laws of Missouri. In 1891 (before Apitz became a member), a charter was obtained in Indiana and the company incorporated in Indiana took over the liabilities and obligations of the Kentucky and Missouri corporations, and is the corporation that issued the certificate in question to Apitz, and the one doing business in Illinois ever since that time, although in its annual statement to the Insurance Superintendent of Illinois for the year 1912, it states, by inadvertance or otherwise, that it was organized under the laws of the State of Kentucky.

We are of the opinion that the substantial error in the trial was in submitting the question of the time of the death of Apitz to the jury; that under the admitted facts he died at the end of seven years from the date of his disappearance, and under section 9 of the by-laws of appellant recovery was precluded.

Appellant also urges that the court erred in refusing to enter judgment for the defendant on the special verdict under section 3 of its by-laws, above quoted, limiting the time in which action can be brought to one year from the date of death; and appellee answers that appellant by enacting section 9 of its by-laws, and receiving assessments for one year after the date of disappearance, waived the provisions of section 3, because it received assessments after the death of the member if he died within a year, as the jury found he did; and that appellant had knowledge when it received the assessment of the fact of his disappearance. We do not see how such a construction can be reasonably

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adopted. The beneficiary was under no obligation to continue the payment of assessments, but was given the option to do so for one year and prevent for that period of time the suspension of the member for non-payment of dues, at the risk of losing the amount so paid if the member was not found within that year.

Holding as we do that there can be no recovery under the admitted facts, the judgment is reversed.

*Reversed with finding of facts.*

Finding of facts. We find from the evidence that August F. Apitz died November 7, 1912; that under the by-laws of appellant to which the certificate here sued on was subject, he stood suspended November 7, 1906; and that appellee has no cause of action upon said certificate.

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**Edward Doubet et al., Appellees, v. Peter Doubet,  
Appellant.**

**Gen. No. 6,040.**

1. **ESTOPPEL, § 66\***—*when minor heirs not estopped by act of administrator from insisting that land received by heir was as an advancement.* In an action by administrators to recover from a son of intestate the value of land transferred to him by intestate in his lifetime, such value being expressed in the deed, under a written agreement whereby he agreed that such amount should be regarded as an advancement, and should be deducted from his distributive share of intestate's estate, and where the trial court required plaintiffs to elect on what ground they would proceed, as between the theory of an advancement and that of a debt due to the estate, minor heirs of intestate, parties to the proceeding, *held* not bound by such election nor precluded thereby from insisting on their demand that the amount received by defendant should be deducted from his distributive share of the estate.

2. **JUDGMENT, § 482\***—*when judgment in action of partition not res judicata as to distributees making claim for an advancement made to heir.* Sections 4-7 of the Descent Act (J. & A. §§ 4205-4208),

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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relating to advancements, make no such distinction between advancements made in land and those made in personalty as to estop administrators and distributees from making claim in the Probate Court to recover the amount of an advancement in land, the value of which is expressed in the deed, nor is such action *res adjudicata* by reason of the fact that owing to such a distinction the question of such advancement should have been determined in a partition proceeding to which plaintiffs were parties, but in which such question was not decided.

3. **ADVANCEMENTS, § 13\***—*when immaterial whether contract provides for advancement or debt.* In an action by administrators to recover on a written contract whereby, in consideration of the transfer of land to defendant by intestate in his lifetime, defendant agreed that the amount expressed in the deed as the value of the land transferred should be deemed an advancement, and such amount deducted from defendant's share in intestate's estate, it is immaterial whether the claim sought to be enforced be deemed an advancement or as a debt due the estate, as the result is the same in either case.

4. **ADVANCEMENTS, § 13\***—*what power father has to contract with child regarding inheritance.* Although section 7 of the Descent Act (J. & A. ¶ 4208) provides that no gift or grant shall be deemed an advancement unless so expressed or charged in writing, there is nothing in this provision or in any other provision of law applied to advancements which prevents a father from contracting with a son in regard to the son's inheritance.

5. **ADVANCEMENTS, § 13\***—*power of heir to make contract with ancestor regarding distributive share.* An heir or distributee may make a valid and enforceable contract with an ancestor as to the participation of such heir or distributee in the estate of the ancestor.

6. **ADVANCEMENTS, § 13\***—*what are proper subjects of contract.* Estates in expectancy are proper subjects of contract, and such contracts, as well as contracts between parent and child as to the expectancy of the child in the estate of the parent, will be enforced.

7. **ADVANCEMENTS, § 11\***—*what is effect of contract for an advancement.* Where a son receives from a father a parcel of land of a value named in the deed, on the agreement that the gift shall be deemed an advancement, and the amount named in the deed deducted from the son's distributive share in the father's estate, such contract is valid, and is based on a valid consideration and fixes the rights of such son, and the theory of advancements does not operate either to relieve the administrators of such father from enforcing the contract, or to enable the son to prevent its enforcement.

8. **ADVANCEMENTS, § 15\***—*when contract between intestate and son construed to give Probate Court jurisdiction.* Where a contract

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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between an intestate and his son whereby the son received from intestate a transfer of land, the value of which was expressed in the deed, and which contract provided that the amount so expressed should be deemed an advancement and should be deducted from the "distributive share" of such son in intestate's estate, such a contract can have no other meaning than that the matter should be adjusted in the Probate Court which has jurisdiction, ordinarily exclusive, of the distribution of personal estates, and not in chancery proceedings to which heirs, as such, must ordinarily resort to adjust their differences.

9. **ELECTION OF REMEDIES, § 11\***—*when election of wrong remedy by administrator not fatal.* In an action by administrators to recover the amount of an advancement to a son of intestate, where on the trial in the Circuit Court of an appeal from the County Court plaintiffs were required to elect on what ground they would proceed, as between the theory of an advancement and that of a debt due the estate, the demand sought to be enforced does not fail if plaintiffs made a mistake in making such election, since the Circuit Court, in trying the appeal, was sitting with substantially the same jurisdiction as the Probate Court, and as in such cases it is not the policy of the law to embarrass trials with technical pleadings, so that if correct conclusions were arrived at on competent evidence, it is unimportant whether either litigant or court were accurate in the reasoning which led to such conclusion.

10. **INFANTS, § 25\***—*when minors entitled to protection of court.* Where the rights of minors are involved as parties to an action, such rights must be protected although technical pleadings are required in the form of action brought, and although if such minors were adults, they could have no relief owing to defects in such pleadings.

11. **NEW TRIAL, § 5\***—*when should be granted.* A new trial should be granted where it appears that a party has been deprived of a jury trial by some mistake in the trial of a case arising from a wrong theory, or where such party by reason of such mistake has been put to disadvantage in the introduction of evidence.

12. **JURY, § 10\***—*when administrator not entitled to jury trial on appeal from Probate Court.* No party to a proceeding brought in the Probate Court is entitled to a jury trial in the Circuit Court on appeal from the decree of the Probate Court.

13. **NEW TRIAL, § 5\***—*when should not be granted.* In an action originally commenced in the Probate Court by administrators to recover from a son of intestate the value of certain land transferred to such son, such value being expressed in the deed, under an agreement that it should be deemed an advancement in the amount named

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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in such deed, which amount should be deducted from defendant's distributive share in intestate's estate, and which action was subsequently tried on appeal in the Circuit Court, the question to be determined by the Probate Court in the first instance, and by the Circuit Court on appeal, was whether defendant's distributive share should be diminished by the amount agreed upon in the contract, and any defense to such contract should have been made at the hearing, and a new trial should not be granted, notwithstanding the fact that the Circuit Court required plaintiffs to elect on what ground they would proceed, as between the theory of an advancement or of a debt due the estate, and plaintiffs may have made a wrong election as between the two theories.

14. PRODUCTION OF BOOKS AND PAPERS, § 5\*—*when production of copy of instrument sued on may be required.* In an action grounded on a written instrument, defendant has the right either to call for a copy of the instrument sued on before the trial, or if on the proof of the document it appears to defendant that his defense called for proceedings and evidence differing from those before supposed necessary, defendant may ask for time and opportunity to present such defense.

15. EXECUTORS AND ADMINISTRATORS, § 496\*—*when evidence to show signing of contract.* In an action by administrators to enforce a written obligation alleged to have been signed by defendant wherein defendant, in consideration of a transfer of certain land by intestate agreed that the amount expressed in the deed to be the value of the land transferred should be deemed an advancement and deducted from defendant's distributive share of intestate's estate, a finding that defendant signed the writing *held* not erroneous, although the original writing sued on was lost and not produced at the trial, it appearing that after the death of intestate defendant admitted he owed the estate the amount sued for, and had signed and delivered to intestate in his lifetime a writing exactly like that given by a brother to intestate in a similar transaction, except that the amount named in the deed as the value of the land transferred was different from that named in the deed to such brother, from which writing given by such brother the contents of the writing signed by defendant was ascertained.

16. WITNESSES, § 132\*—*when party defendant not competent to deny signature of contract with decedent.* In an action by administrators to recover a sum alleged to be due to intestate's estate from defendant arising out of a written contract made with defendant in his lifetime, the exclusion of defendant's testimony in his own behalf that he never signed the contract sued upon *held* not erroneous, defendant not being a competent witness in his own behalf as to transactions with intestate before intestate's death.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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17. EVIDENCE, § 44\*—*when no presumption of release because obligation not found.* Where a father enters into a written contract in his lifetime with a son which imposes a burden on the son, the fact that the writing evidencing the obligation was not found among the father's papers at his death raises no presumption that deceased destroyed the writing with intention to release the son from the obligation imposed by the writing, although the father is shown to have destroyed a will he once made, and dies intestate, nor will the loss of such a writing or the failure to account for such loss work a release of such obligation.

18. APPEAL AND ERROR, § 1488\*—*when admission of incompetent testimony not error.* A court trying a case without a jury can hardly err in the admission of incompetent testimony.

19. EVIDENCE, § 125\*—*when secondary evidence admissible.* In an action grounded on a written instrument where it is conceded that the writing sued on is not in existence, secondary evidence thereof is competent.

20. APPEAL AND ERROR, § 1240\*—*when party cannot complain of unnecessary written pleadings.* In an action where written pleadings are not required, a party cannot be said to have been prejudiced by unnecessary written pleadings where such party was mainly responsible for getting such pleadings into the case.

Appeal from the Circuit Court of Peoria county; the Hon. N. E. WORKHINGTON, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed October 20, 1915. *Certiorari* denied by Supreme Court (making opinion final).

JUDSON STARR, for appellant.

GLEN CAMERON, SHEEN & GALBRAITH and DAN R. SHEEN, for appellees.

MR. JUSTICE CARNES delivered the opinion of the court.

Joseph Doubet, the owner of a large real and personal estate on April 2, 1888, executed a warranty deed in the usual form (his wife joining therein), of an eighty-acre tract of land to his son Peter Doubet, the appellant, for an expressed consideration of \$4,500, "and other good and valuable considerations," the

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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receipt of which, though no money was paid, was in the deed acknowledged. Following a form he had used with another son, it is claimed he took from Peter a writing as follows:

“Received of my father, Joseph Doubet, the sum of Four Thousand Five Hundred (\$4,500) Dollars as an advancement on my share of his estate, and I hereby agree that in settlement of his estate by an administrator or executor the said sum of Four Thousand Five Hundred (\$4,500) Dollars shall be by him charged against me as such advancement and said amount shall be deducted from my distributive share, but no interest shall be counted thereon.

(Signed) Peter Doubet.”

This deed was kept in the grantor's possession for some time, but was delivered and recorded before his death. Peter was in possession of the land at and before the time of making the deed, and always remained in possession. No question arises here of the validity of the deed, or of its delivery in the lifetime of the grantor.

Joseph Doubet died intestate December 19, 1909, and administration of his estate is pending in the Probate Court of Peoria county. In a final report filed in December, 1911, his administrators, Edward Doubet and Ida Mitchell, the appellees, inserted the following item:

“Items of receipts. Amount advanced to Peter Doubet for land conveyed by Joseph Doubet to said Peter Doubet, or to amount owed by said Peter Doubet to Joseph Doubet for land conveyed by Joseph Doubet to said Peter Doubet in lifetime of said Joseph Doubet . . . . . \$4,500.00.

“12/18/11. Peter Doubet owes to the estate of said Joseph Doubet the sum of \$2,739.40 after allowing him his full share of said estate, which amount the Adms. of said estate ask the court to order said Peter Doubet to pay back.”

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The distributees of the estate were duly notified, and appellant appeared in the Probate Court and contested that item of the report. The matter was heard, and the court found that Peter Doubet had received from the administrators in cash, on his distributive share, \$6,500, and had filed a refunding bond conditioned that he would refund to the estate any portion thereof to which he was not entitled, or that would be needed for the proper settlement of the estate; that he is indebted to the estate in the sum of \$4,500, as set forth in the report. And ordered that he pay to the administrators the difference between that sum and his final distributive share of said estate, and approved the report.

Appellant appealed to the Circuit Court where the parties appeared. Some of the distributees were minors and appeared by guardian *ad litem*. The administrators filed what is called a bill of particulars as follows:

“Peter Doubet

To Estate of Joseph Doubet, deceased.

“To advancement of the East Half of the Southwest Quarter of Section 12 in Logan Township, Peoria County, Illinois, at the fixed and agreed valuation of . . . . . \$4,500.00

“As per written instrument signed by said Peter Doubet and dated on or about April 2, 1888, and by said Peter Doubet delivered to said Joseph Doubet, deceased.

“Peter Doubet

To Estate of Joseph Doubet, Dr.

“12/9/07. To amount due from Peter Doubet to Joseph Doubet for the East Half of the Southwest Quarter of Section 12 in Logan Township, Peoria County, Illinois . . . . . \$4,500.00.”

There was much pleading and much contest about the pleadings, though this is a statutory proceeding, in which written pleadings are not required. The court

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at the instance of appellant compelled the administrators to elect and say whether they were proceeding on the theory of an advancement to Peter Doubet, or a debt due from him to the estate, and they said they would proceed on the theory of an advancement. The court heard much evidence as to the transaction, the guardian *ad litem* protesting that the minors were entitled, as distributees, to demand that any debt from appellant to the estate should be deducted from his distributive share, and were not at all precluded from insisting on their demand by any mistake of the administrators in naming the transaction from which the indebtedness arose; and in this contention he was right.

Among other things, in support of his objection to this item of the report, appellant claimed that the whole question was *res adjudicata* by reason of a partition proceeding wherein the heirs, who were the same persons as the distributees appearing in this case, had procured the sale of the real estate of which Joseph Doubet died seized, and the distribution of the proceeds among them. The eighty acres here in question were not sought to be partitioned, but it is assumed that any question of advancement of that eighty acres should have been determined in that partition proceeding. The cause was referred to the master in chancery to take testimony and report his conclusions of law and fact on this question of *res adjudicata*, which he did, reporting that the matters here in question were not passed upon or necessarily involved, in the partition proceedings; that the advancement alleged was to be adjusted in money upon the settlement of the estate; that the personal estate has been at all times sufficient to enable the Probate Court to adjust that matter between the distributees; that there was no reason for the court's adjusting that matter in the partition proceeding, and it did not in fact assume to take jurisdiction of the question, and that the objection of *res adjudicata* is not well taken. The question whether there was in fact

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an advancement, or debt, was not submitted to or passed upon by the master.

The chancellor, after hearing much evidence, entered an order finding that the order of the Probate Court, "from which this appeal is taken, should be and is hereby confirmed, and the final report of said administrators made therein, should be and hereby is affirmed. The court further finds that the sum of \$4,500.00 objected to by Peter Doubet herein, was and is a proper charge against his share of the estate of Joseph Doubet, deceased, and a proper credit in favor of said estate, in said final report, as shown herein, as filed and approved by said estate, and in the judgment of the court the said \$4,500.00 was in the nature of an advancement made by deed by Joseph Doubet, the father of said Peter Doubet, many years before his death, to said Peter Doubet, of 80 acres of land, at a fixed valuation of \$4,500.00 and was so received as an advancement of such valuation by said Peter Doubet, and has been so held and enjoyed by him ever since." And certified the findings to the Probate Court for further proceedings, from which order this appeal is prosecuted.

Appellant presents an exhaustive brief on the law of advancement, claiming that our statute (sections 4 to 7 of the Descent Act, J. & A. Stats., vol. 2, ¶ 4205 *et seq.*) so distinguishes between advancements in land and in personalty that the distinction must be observed in settlement of estates, and an advancement in land adjusted in the partition of real estate or other proceedings in which the heirs as distinguished from the distributees are parties; and if the heir receiving the advancement has sufficient interest in the remaining real estate to enable a court of chancery in a partition proceeding to adjust the matter there, it must be done; and a failure to procure that action of the court in a partition proceeding estops the heirs, as distributees, from asking an adjustment in the settlement of the

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personal estate in the Probate Court. There had been a partition proceeding, and appellant's share of the proceeds of that was sufficient to meet the demand upon him, therefore appellant says: "It is *res adjudicata* whether we consider it as a case of mistaken defense or whether we consider it as a case where a defense might have been made and was not made." He also says the question is undetermined in this State and asks us to construe the statute. It appears that certain of the heirs filed a cross-bill, claiming that there had been advancements to Peter and other children and asking relief, and that the cross-bill was dismissed by the court without prejudice; and that they then filed an original bill concerning these matters to which a demurrer was sustained and the bill dismissed without prejudice, and that decree affirmed on appeal to this court in *Falor v. Doubet*, 164 Ill. App. 433. It is contended that the subject-matter here now is an advancement in land, and, because of something in those partition proceedings, the administrator and distributees are estopped from making this claim in the Probate Court. We do not see any good ground for this contention, and we are unable to see the application of the great number of decisions of this and other jurisdictions cited by appellant on the law governing advancements. It does not seem to us very important whether the transaction in question here is or is not an advancement in land. Appellant in one part of his brief argues that it was not an advancement, and that the evidence relied on by appellees, including the deed, shows it was not an advancement, but if any obligation it was a debt. We are inclined to that view of the situation, but do not so hold because in our opinion whatever may be the name of the transaction the same result is reached. It is true that under our statute no grant is deemed an advancement unless so expressed or charged in writing by the intestate, or so acknowledged by the child, and questions often arise

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as to what writing is sufficient. But there is nothing in this provision of law, or any other provision applied to advancements, that prevents a father from contracting with his son in relation to his inheritance. It is a general rule that an heir or distributee may make a valid enforceable contract with an ancestor as to his participation in the estate. 14 Cyc. 91. The courts of this State have always been liberal in holding that estates in expectancy are appropriate subjects of contract, and in enforcing such contracts, and contracts between parent and child as to the expectancy of the child in the parent's estate. *Bolin v. Bolin*, 245 Ill. 613, and earlier Illinois cases there cited. The rights of appellant are fixed by the contract he signed, in which he agreed that the personal representative (administrator or executor) of his father in the settlement of the estate should charge him \$4,500, and deduct it from his distributive share of the estate. This was a valid agreement based on a valuable consideration, and we fail to see anything in the doctrine of advancements that relieves the administrators of the duty of doing exactly what appellant contracted they should do, or that enables appellant to prevent their doing it. We do not see how the heirs, as such, in chancery proceedings, to which they must ordinarily resort to adjust their differences, could well call upon appellant to settle the matter that he had expressly contracted should be adjusted in the administration of the personal estate; and his contract that \$4,500 should be taken from his share as distributee can have no other meaning than that the matter should be adjusted in the Probate Court which has jurisdiction, and ordinarily exclusive jurisdiction, of the distribution of personal estates. In affirming the decree dismissing the bill in *Falor v. Doubet*, *supra*, this court, among other reasons, stated that the matter could be adjusted in the Probate Court, and it is much clearer that it can and must be there adjusted on the facts presented by this record than it

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was on the facts alleged in the bill which the court was then considering.

But it is assumed by appellant, and argued with great confidence, that when he succeeded on the trial in the Circuit Court in getting the administrators to name their claim, and state their reasons for asking a deduction from his distributive share, that their demand failed if they made a mistake in so doing. We do not take that view of the case. The Circuit Court was sitting with substantially the same powers and duties as was the Probate Court in hearing the matter. It is not the policy of the law to embarrass such trials with technical pleadings. The hearing is before the court without a jury, and the purpose of the trial is to arrive at correct conclusions and results. If such results are reached on competent evidence, it is not important whether either the litigant or the court was accurate in the process of reasoning leading to the conclusion. Even where technical pleadings are required, the rights of minors, parties to the suit, should be protected, even though they could not have relief, if adults, because of some defect in the pleadings. *Stark v. Brown*, 101 Ill. 395; *Mason v. Truitt*, 257 Ill. 18.

It may well be, if, because of some mistake in the trial of a case arising from a wrong theory, a party is deprived of the right of trial by jury, or put to a disadvantage in introduction of evidence, that he should be allowed another trial. But whether the name of the claim here is advancement or debt, appellant was not entitled to a jury trial. *Heward v. Slagle*, 52 Ill. 336; *Martin v. Martin*, 170 Ill. 18; *Maynard v. Richards*, 166 Ill. 466; *Coffey v. Coffey*, 179 Ill. 283. It was the duty of the Probate Court in the first instance, and of the Circuit Court on appeal to, without a jury, determine whether there should be a deduction from appellant's distributive share of the estate. No question is raised here of the action of the court in referring one question in the case to the master in chancery, and we



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have considered the case on the evidence, which was all before the court, without considering what, if any, effect the findings of the master should have in a trial of this kind. The question was whether appellant's distributive share should be diminished by the amount agreed in his contract, and if there was any defense it should have been made on the hearing, whether the theory of the administrators as to the name of their claim was right or wrong. The bill of particulars on which the Circuit Court tried the case, and that part of it on which appellant relies in saying he was defending only an advancement in land, stated that it was, as per written instrument, signed by said Peter Doubet and delivered by him to his father. He had the right to call for a copy of the instrument before entering on the trial, and though the instrument itself was lost, the administrators had knowledge of its contents and could have furnished a copy. Appellant, failing to do this, could when the instrument was proven, if in his opinion a defense to his promise there made called for different proceedings and evidence from what he before supposed necessary, have asked an opportunity, and time, to present such defense, which would no doubt have been granted. But he did neither. It is argued by appellant that it was not proven that he signed the writing in question. The testimony offered by appellee showed that appellant after the death of his father admitted that he owed the estate \$4,500 on account of this transaction; that he had signed and given his father a writing exactly like the one his brother Joe gave his father, except the amount in his (appellant's) was \$4,500 and in Joe's it was \$4,000. This is the statement from which the contents of the writing is found. The paper signed by appellant was not discovered after the death of the father. That it had not been paid or settled in his lifetime is shown by appellant's statement after his death that he still owed that amount. But it is argued that the record does not

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sustain the finding that appellant made those admissions; that the evidence of them is contradictory, in conflict with pleadings of the witnesses as parties to the prior suits mentioned, and for other reasons should not be believed; and that the court erred in not permitting appellant to testify that he signed no such paper when his deed was delivered.

We are satisfied from a reading of the record that the court did not err in finding that the writing was signed by appellant. We see no room for contention that appellant was a competent witness in his own behalf as to the transaction in the lifetime of his father. Appellant argues that the fact that the paper was not found among the papers of deceased gives rise to the presumption that deceased in his lifetime destroyed it, and urges the fact that he is shown to have destroyed a will he had made, in support of that presumption, and argues the case on the theory that the destruction of this paper by the father would release appellant from liability thereon. We do not so understand it. It was a contract imposing a burden on appellant, and we do not see how the loss of the writing evidencing the contract and failure to account for such loss could work a release of his obligation.

Some objection is made to the action of the court in ruling on the evidence, other than above noted; but none was rejected that would have been of material benefit to the appellant, and in a hearing before the court, without a jury, he can hardly err in admitting incompetent evidence. It is said there was no ground for admission of secondary evidence of the writing relied on. It was conceded by everybody on the trial that it was not in existence, and we see no reason why its contents should not have been proven in the way it was proven.

Appellant's case does not seem to have been prejudiced by unnecessary written pleadings, and if it was he was mostly responsible for getting them into the

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case. The order could not have been different from that made by the court, therefore the order and judgment is affirmed.

*Affirmed.*

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**Henry Mullen, Defendant in Error, v. W. O. Johnson,  
Receiver, Plaintiff in Error.**

**Gen. No. 6,069. (Not to be reported in full.)**

Error to the Circuit Court of Lake county; the Hon. CHARLES H. DONNELLY, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed October 20, 1915.

**Statement of the Case.**

Action by Henry Mullen, plaintiff, against W. O. Johnson, receiver, defendant, in the Circuit Court of Lake county, to recover for personal injuries alleged to have been sustained by plaintiff as a result of a collision between a covered wagon which plaintiff was driving, and an electric street car of a street railroad company of which defendant was receiver. To reverse a judgment for plaintiff for \$1,500, defendant prosecutes this writ of error.

On the 5th day of August, 1912, plaintiff was driving a covered wagon with a load of cut flowers on a public highway from the City of Lake Forest, Illinois, north to the City of Waukegan, and while crossing the double tracks of the Chicago & Milwaukee Electric Railroad Company, of which company the defendant was receiver, the hind wheel of his wagon was struck by a car running north on the east track and he claims to have been injured by the shock of the collision.

The plaintiff was a man about forty-five years old, in the employ of a florist and had been over this highway many times and was familiar with the location and

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operation of cars there. He had been driving north on a highway that ran a little distance away from the electric railroad, perhaps forty-five feet. At a point not far from where the accident happened the car tracks came on to the public street at a place where it deflects slightly to the east. It was natural and usual for drivers of vehicles to cross the car tracks to get on the east side of them at about this point where the road deflects, and there was a portion of the road worn by travel indicating where teams had often crossed. The evidence is conflicting whether plaintiff crossed at the beaten path or drove along the west track for some distance and then abruptly turned and crossed the east track ahead of the approaching car. The view was unobstructed for several hundred feet from the place of the accident.

The case has been twice tried. Plaintiff first filed a declaration of one count charging in general terms that defendant was negligent in that the operation of the car in question was careless and improper, to which defendant pleaded the general issue. At the close of all the evidence a juror was withdrawn and the case was continued, after which plaintiff filed another count charging wilful, wanton and malicious injury. A second jury trial followed, at which the jury found defendant guilty as to the first count and not guilty as to the additional count. Motions by defendant for a new trial and in arrest of judgment were overruled.

BULL & JOHNSON and CHARLES H. KING, for plaintiff in error.

CHIPMAN & JACKSON, for defendant in error.

MR. JUSTICE CABNES delivered the opinion of the court.

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### Abstract of the Decision.

1. **STREET RAILROADS, § 97\***—*when driver crossing in front of car guilty of contributory negligence.* One who is driving a vehicle in a public highway parallel to a street car track and who suddenly turns upon the track without looking to see if a car is approaching is not in the exercise of ordinary care, and in case that the vehicle is struck by a car such driver is guilty of contributory negligence.

2. **STREET RAILROADS, § 91\***—*what care drivers of vehicles must exercise.* Drivers of vehicles have not equal rights in the highway with street cars so that such drivers may drive on or across street car tracks between street intersections, knowing that a collision will be inevitable unless the car is stopped, and may not rely on the motorman of such car to prevent such collision by stopping his car.

3. **STREET RAILROADS, § 64\***—*what care required in operation of car at crossings.* A street car should be operated with more care at places habitually used by the public for crossing the track than at places not customarily used for crossing.

4. **STREET RAILROADS, § 63\***—*what degree of care required in operation of car at place other than usual crossing.* A motorman of a street car who sees the driver of a vehicle proceeding along the track without crossing at the usual place may assume, in the exercise of due care, that such driver does not intend to cross, and therefore not hold his car in such good control as if he saw such driver approaching such crossing.

5. **STREET RAILROADS, § 111\***—*when motorman presumed to know possible presence of vehicles at crossing.* A motorman operating a street car in a public highway who is approaching a usual place of crossing is presumed to know that there may be vehicles crossing at such point, and therefore, if he sees an approaching vehicle, be bound to keep his car in better control than at other points.

6. **STREET RAILROADS, § 73\***—*when signals necessary.* In case of a collision between an electric street car and a vehicle, the question whether the motorman gave signals or not is only important where the collision took place at a street intersection where the motorman is presumed to know that such vehicles might be crossing, or where such signals are necessary in the exercise of due care in order to give warning of the approach of his car to a vehicle ahead of the car which, without such warning, might turn upon the track, such signals being unnecessary at other times.

7. **APPEAL AND ERROR, § 1778\***—*when case will not be reversed without remanding because of insufficiency of proof.* In an action to recover for personal injuries alleged to have been sustained by reason of a collision between a wagon which plaintiff was driving

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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and an electric car, due to defendant's negligence, where the evidence of plaintiff was vague and contradictory and tended to show contributory negligence in that plaintiff attempted to cross the track in front of the car at a point other than the usual crossing, evidence *held* insufficient to warrant the Appellate Court in reversing without remanding.

8. STREET RAILROADS, § 131\*—*when evidence insufficient to establish wilful and wanton conduct in operation.* In an action to recover for personal injuries sustained as a result of a collision between a wagon which plaintiff was driving and an electric car, due to defendant's alleged negligence, where one of the counts of plaintiff charged wilful, wanton and malicious injury in the operation of the car in question, a verdict of not guilty as to this count *held* right, there being no evidence of wilful and wanton conduct in running the car at a high rate of speed.

9. NEGLIGENCE, § 68\*—*when one failing to employ all reasonable means to avoid injury may not recover.* In an action to recover for personal injuries alleged to be due to defendant's negligence, plaintiff cannot recover if he was negligent in failing to employ all reasonable means to avoid the injury.

10. STREET RAILROADS, § 131\*—*when evidence insufficient to warrant finding of lack of contributory negligence.* In an action to recover for personal injuries sustained as a result of a collision between a wagon which plaintiff was driving and an electric car, due to defendant's alleged negligence, evidence *held* insufficient to warrant a finding that plaintiff was at the time of the accident in the exercise of due care.

11. STREET RAILROADS, § 131\*—*when evidence insufficient to sustain finding of negligence.* In an action to recover for personal injuries sustained as a result of a collision between a wagon which plaintiff was driving and an electric car, alleged to be due to defendant's negligence, evidence *held* insufficient to sustain a finding that defendant was negligent.

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**Sholl Brothers, Defendants in Error, v. Peoria & Pekin  
Union Railway Company, Plaintiff in Error.**

**Gen. No. 6,075.**

1. EVIDENCE, § 351\*—*when evidence admissible to ascertain intent of parties to contract.* Evidence of the construction placed on a written contract by the parties, when competent, is a valuable aid in ascertaining the intention of such parties, but when competent its use

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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is limited to ascertaining such intention, and such evidence cannot be used to force a new and different meaning into the contract.

2. **CONTRACTS, § 187\***—*when construction by parties adopted.* Where the terms of an agreement are in any respect doubtful or uncertain, if the parties thereto have by their own conduct placed thereon a reasonable construction, the courts will adopt such construction in litigation concerning it.

3. **EVIDENCE, § 351\***—*when evidence not admissible in aid of construction of contract.* Where a contract is clear and unambiguous and there is no doubt as to the identity of the subject-matter to which it relates, no extrinsic evidence is competent in aid of construction.

4. **EVIDENCE, § 156\***—*when statement of attorney at trial admission of uncertainty of contract.* In an action involving the construction of a written contract, a statement of counsel that it is the duty of the court in construing the contract to look to facts *dehors* the contract in order to ascertain the intention of the parties, and the necessity for such a statement, is a virtual admission that there is uncertainty in the language of such contract as to require external aid to ascertain its meaning.

5. **CONTRACTS, § 8\***—*when contract not clear and unambiguous.* In a bill to enforce a contract whereby plaintiff contracted with defendant railroad company to construct and operate on plaintiff's land a branch track from its main line to plaintiff's coal mine, defendant to have the right to use such track for all purposes and to serve all industries "or for the purpose of making connections with any other industries except coal mine" which might thereafter be located in the vicinity reached by such track, contract *held* not clear and unambiguous in that it admitted of conflicting constructions equally plausible and depending in each case on the consideration of extrinsic circumstances.

6. **CONTRACTS, § 188\***—*when construction placed by parties on ambiguous contract controlling.* In a bill to enforce an ambiguous contract whereby plaintiff contracted with defendant railroad company to construct and operate on plaintiff's land a branch track to its coal mine, wherein defendant was permitted the use of the track for all purposes except "coal mine," the fact that the parties had for some time placed a construction thereon which precluded defendant from transporting over such track in either direction any coal not mined by plaintiff, *held* to control in determining the meaning of the contract.

7. **INJUNCTION, § 245\***—*when may be violated with impunity with consent of party procuring.* Where only private interests are concerned, neither contracts of parties nor judgments nor decrees of

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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courts stand in the way of any action taken by and with the consent of all parties interested, so that where an injunction has been granted restraining the transportation of certain coal over a railroad, no danger need be apprehended by the party restrained if in the future it transports such coal with the consent of the party procuring the injunction, although by such transportation such injunction may be technically violated.

8. RAILROADS, § 355\*—*when contract limiting use of railroad track void.* Where a particular railroad track in question is a part of a public railroad, any contract limiting the public use thereof is void.

9. RAILROADS, § 194\*—*when contracts for switch tracks over private property valid.* Owners of private property may contract with railroad corporations for switch tracks to be laid over their own private property without submitting such tracks to burdens imposed on the main lines of such railroads.

10. RAILROADS, § 194\*—*when no right to regulate private railroads under Constitution.* Section 12 of article XI, of the Constitution, declaring that public railroads are public highways and providing that they shall be free to all persons for the transportation of their persons and property thereon under such regulations as may be prescribed by law, applies only to railroads constructed for public use, and only such are intended to be regulated thereby, the Constitution having no reference to railroads constructed for private use.

11. RAILROADS, § 194\*—*when private railroad may become subject to constitutional provisions.* Although a railroad may be originally constructed for private use and not within the regulation of section 12, article XI, of the Constitution, regulating public railroads, yet where the contract under which it was constructed provides for other uses and where the use of such private railroad is from time to time extended by connections so as to make other and further use of it, it is a fair question whether in such extended operation it has not become part of a public highway, and within the regulation of the Constitution as part of a public railroad.

12. RAILROADS, § 194\*—*what constitutes a private railroad.* In a bill to enforce a contract whereby plaintiff contracted with defendant, a railroad company, to construct and operate a branch track from its main line to plaintiff's coal mine, in which contract defendant had the right to use such track for all railroad purposes except a named purpose, *held* that such branch track was a railroad constructed for private use, and hence not within the regulation of section 12, article XI of the Constitution, regulating public railroads.

13. RAILROADS, § 196\*—*when agreement for construction of private*

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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*track valid as against State.* A contract whereby an owner of a coal mine contracts with a railroad for the construction and operation on plaintiff's land of a branch track from its main line to plaintiff's coal mine, wherein defendant has the right to use such track for all railroad purposes other than "coal mine," is not in violation of any public right, although a State institution in the vicinity has no other railroad connection, and thereby suffers a hardship in that such railroad cannot transport to it any coal other than that mined by such owner, since the State is in no other or better position, as to its property, than other owners of property similarly situated.

Error to the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.

FRANK T. MILLER, for plaintiff in error; STEVENS, MILLER & ELLIOTT, of counsel.

FRANK J. QUINN, for defendant in error; QUINN & QUINN, CHARLES V. O'HERN and JOHN DOUGHERTY, of counsel.

PATRICK J. LUCEY, Attorney General, filed a brief in behalf of the State *amicus curiae*; LESTER H. STRAWN, Assistant Attorney General, of counsel.

MR. JUSTICE CARNES delivered the opinion of the court.

Scholl Brothers, the defendants in error, filed a bill to enjoin the Peoria & Pekin Union Railway Company, the plaintiff in error, from moving on or over a certain track any coal or coal mine products not mined on lands of the complainants. The defendants answered the bill and the cause was submitted to the master in chancery to take evidence and report his conclusions of law and fact, which he did, recommending that the injunction issue. Objections and exceptions to the master's report were duly entered, argued and overruled, and a decree of injunction entered substantially as prayed in the bill, and the defendant railway company brings the case here on writ of error.

The facts as stated in the brief of the plaintiff in error are admitted by the defendants in error sub-

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stantially correct in all the main features of the case, and are substantially as follows:

Sholl Brothers were the owners in fee simple of certain surface and coal lands in or near South Bartonville, Illinois, a town or village, lying between Peoria and Pekin, Illinois. These coal lands lie on a high ridge, approximately one hundred and fifty feet above a valley, through which, parallel with the Illinois River, is one of the main lines of the Peoria & Pekin Union Railway Company.

In 1896 the defendants in error sought to develop this mining property, and sunk a shaft at the top of this ridge, which became known as "Sholl Mine No. 3" or "Prosperity Mine." The Peoria & Pekin Union Railway Company at that time had the only railroad running near these lands. In order to get railway connections with the shaft and mine, the defendant in error induced the plaintiff in error to enter into a written contract under which a switch was laid in 1896, and from that time up to the present this switch has served this mine.

This proceeding involved the construction of that contract, which is as follows:

"ARTICLES OF AGREEMENT made this 16th day of July, A. D. 1896, by and between the PEORIA & PEKIN UNION RAILWAY COMPANY, a Corporation of the State of Illinois, party of the first part, and Jas. M. Sholl, Henry S. Sholl and Samuel V. Sholl, doing business under the name and style of SHOLL BROTHERS, parties of the second part.

"WITNESSETH: That said party of the first part  
a. will put in a side track and side track facilities for said second parties from its main track to a coal mine near Bartonville, Illinois,—which mine is to be operated by said second parties and is about to be opened by them,—upon the following terms and conditions:

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b. “The said second parties shall furnish the right-of-way, grade and bridge the same, from the main track of said first party to said mine, and do all grading and bridging necessary for tracks at the Mine, free of all cost to said first party, and shall also pay to said first party, the sum of Three Hundred Dollars (\$300.00) as their proportion of the first cost of ties to be used in constructing said side track.

c. “Upon condition that said second parties comply with the foregoing agreements and conditions, said first party agrees to furnish the balance of ties and other material necessary, including rails, laying the track from its main track to the Mine and the necessary Mine tracks, and to maintain such track at its own expense.

d. “In consideration of so doing, said first party is to have, at all times, exclusive use of said tracks and right-of-way. It shall also have the right to use said right-of-way and tracks in handling the business of, or for the purpose of making connections with, any other industry except coal mine, that may hereafter be located adjacent to said right-of-way or reached from said right-of-way, provided said first party shall always do such other business in a manner which will not interfere with the business of said second parties.

e. “In consideration of the premises, said second parties agree to ship their Mine output that shall be shipped by rail, or the product of any other industry which they may hereafter locate on or near the line of said right-of-way, over the rails of said first party, at equal rate. All rates to be determined hereafter in the usual manner of fixing rates for such business.

“This contract shall extend to and be binding for a period of twenty-five (25) years from the date hereof, and thereafter until either party gives

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- f. sixty (60) days' notice of its desire to terminate said contract, upon said first party, its successors and assigns, and upon second parties, their heirs, administrators and assigns.

“IN WITNESS whereof, etc.” (We have for purposes of reference, indicated by letters the different clauses of the contract.)

This track so arranged for was completed during the year 1896, each of the parties thereto contributing in accordance with the provisions of the contract. Clause *d* requires construction and occasions this dispute. There was no other industry upon that hill at the time, nor so far as the parties contracting them knew, was there one in contemplation. An Illinois state asylum site had been chosen and lay just beyond the Sholls' land, but there were no buildings and none had as yet been provided for.

In addition to the coal lands that the defendants in error then owned, and were obtaining options on, there were several thousand acres of other coal land in near proximity and on the same hill, and the only way to get to a railroad from this coal field would have been over that switch. In other words, the defendant in error had purchased the right-of-way for the only switch track that could be laid in this neighborhood and reach this coal field.

Some time after the construction of this track, buildings were constructed upon the site of the asylum grounds, and during that period of construction much building material was delivered over the Sholl switch which was extended to the hospital site by the Peoria & Pekin Union Railway Company under a special agreement with the State authorities. The asylum was opened for business and commenced to receive patients in February, 1902.

The delivery of coal to this asylum is the cause of this controversy. Complainants claim that under the contract no coal can be transported over this track

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except such as comes from their mine, while the defendant claims that the contract permits it to transport coal to the asylum coming from outside mines.

It seems that from a period between 1902 and 1912 Sholl Brothers had the contract to furnish the coal at the asylum. It also is in evidence that other coal dealers sought to get the contract to furnish this coal but could never get the contract because of the claim on the part of Sholl Brothers that the railway company was not permitted to haul coal over that track other than coal coming from their own mine; that on several occasions attempts were made by other coal dealers to induce the defendant company to transport coal over that track to the asylum, but without success, as it, through its management, held out to the public that it could not accept coal from delivery over this track unless it came from Sholls' mine. There were times, however, when Sholl Brothers, because of breakdowns at their mine, were unable to deliver the coal to the asylum, and at such times they filled their contract with the State institution by procuring coal at other mines; and then especially requested the railway company to deliver coal from such other mines to the asylum. It is claimed now by defendants in error that this course of conduct operated as a practical construction of the contract and that plaintiff in error is bound by such construction.

In 1912 there was for the first time an insistent effort made to induce the management of the plaintiff in error to accept coal for delivery over this switch to the asylum from mines other than Sholl Brothers, so that the State institution, through its proper channel, could advertise for bids for its coal supply. The contract in question was then submitted to the counsel of the plaintiff in error, who advised the management that it did not have the right to refuse to transport coal over that switch from other mines, except coal coming from mines located along the right-of-way of

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this switch, or reached over this switch and established after the execution of this contract. The plaintiff in error then issued a supplement to its regular tariff by which it held out to all shippers of coal (outside of the accepted field) that it would take coal for delivery over the switch in question to the insane asylum.

Afterwards in April or May, 1912, coal coming from Wolschlag mine, located on the main track of the Peoria & Pekin Railway Company, was delivered by the railway company to the asylum and against the protests of Sholl Brothers. This proceeding was then commenced.

The decree found that until December, 1911, both complainants and defendant uniformly and continuously construed the contract as preventing the delivery of coal mined at other points over the switch, and that complainant always insisted on such construction. This finding is not much controverted by plaintiff in error, but it says the questions are: “(1) Is the language of the contract clear and unambiguous, or is it uncertain, doubtful and ambiguous? (2) If the language is clear does the conduct of the parties estop them from claiming that the construction was improper and against the express language employed in the contract? (3) Are the persons or the general public other than the parties immediately contracting bound by the conduct of the contracting parties, and to the injury of the public?” and cites authorities to the effect that the practical construction by the parties to a contract is immaterial where the language employed in the contract is clear and decisive, and claims that the language in question is not ambiguous. The law, no doubt, is as stated in *Gibbs v. People's Nat. Bank*, 198 Ill. 307, that the rule of construction of contracts by the parties to them as governing the construction by the court can only be used to assist in arriving at the intention of the parties, not to force a new and different meaning into the contract, and where no ambiguity appears



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in the contract and the intention is clear on the face of the instrument the rule is not applied. But if the contract is ambiguous, "no extrinsic aid can be more valuable" than "the interpretation that the parties thereto have placed thereon in its performance for assisting in ascertaining its true meaning." *Slack v. Knox*, 213 Ill. 190, and cases there cited. It is said in *People v. Murphy*, 119 Ill. 159, on page 166: "It is a familiar rule of construction, that where the terms of an agreement are in any respect doubtful or uncertain, and the parties to it have, by their own conduct, placed a construction upon it which is reasonable, such construction will be adopted by the courts, in the event of litigation concerning it."

Therefore the inquiry is, Does the contract, and particularly clauses of it, clearly express the intention of the parties, or is it ambiguous, permitting the consideration of its construction by the parties, and the application of the rule?

Counsel for plaintiff in error say: "It is the duty of the court to ascertain the condition of the parties, the circumstances surrounding them, and the motives that moved them at the time of executing the contract in order to determine what their intention was." No such extrinsic consideration is permissible if the contract is clear and unambiguous. The court said in *Stettauer v. Hamlin*, 97 Ill. 312, on page 318: "It is to be observed, however, that while courts, when necessary, put themselves in possession of all the facts and circumstances connected with the execution of an instrument, for the purpose of ascertaining the intention of the parties and explaining any ambiguity arising from extrinsic facts, yet this is never done where the terms of the instrument are clear and unambiguous, and there is no doubt as to the identity of the subject-matter to which the instrument relates." This statement of counsel and the necessity that impels them to invoke the aid of surrounding circumstances to sus-

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tain their construction of the contract is a virtual admission that there is such uncertainty in its language as to require external aid in ascertaining its meaning. The contention is mainly as to the construction of the following language in clause *d*: "Said party is to have, at all times, exclusive use of said tracks and right-of-way. It shall also have the right to use said right-of-way and tracks in handling the business of, or for the purpose of making connections with, any other industry except *coal mine*, that may hereafter be located adjacent to said right-of-way or reached from said right-of-way." Counsel seem to agree that notwithstanding the unqualified right granted by the first sentence, if considered alone, still that right is limited by the language of the second sentence, and that the switch cannot be used by the plaintiff in error in "handling the business of some *coal mine* industry;" but counsel for plaintiff in error say the coal mine industry excluded is one "that may hereafter be located adjacent to said right-of-way," and that "reached from" is not to be construed in the broad sense that would include any coal mine in the United States located on a railroad; that it means only any coal mine that should be located near that of defendants in error; that defendants in error were aiming to prevent competition from mines that might be located near them and therefore were contracting that coal should not be shipped *out* over that track, and were not contemplating danger from coal being shipped *in* over that track, and consequently were not guarding against that kind of shipment, and they argue with much force from a consideration of the surrounding circumstances when the contract was executed that its language should be so construed. Counsel for defendants in error argue from the circumstances surrounding the parties, with about equal plausibility, that the railroad and Sholl Brothers intended to say and did say: The Peoria & Pekin Union shall be

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the only road allowed to use this switch. It can serve all classes of industries and persons, but one, now doing business adjacent to the switch, or who in the future may locate so that they may be reached from the switch, and make all necessary connections, from time to time, to render such service to all such classes. The one class not to be served is the coal producing class, and say it is absurd to suppose that defendants in error were trying to protect themselves from competition in shipping coal out and leave the railway company free to ship coal in. These conflicting constructions of the contract, each capable of plausible and reasonable support, and each requiring in its maintenance the consideration of extrinsic circumstances, leave no doubt that the terms of the contract are not clear and unambiguous, and, as we have before seen, if we are to look beyond the terms of the contract to ascertain its meaning, a very material consideration is the construction placed on it by the parties, and we are of the opinion that the proof in this case of such construction by the parties to the contract should control in determining its meaning. There is no doubt from the evidence that the parties for many years understood the contract in accordance with the conclusion reached by the chancellor, and we are of the opinion that he did not err in so construing it. Counsel argue that the decree enjoining any coal to be taken over the switch except such coal as comes from Sholls' mines is broader than the contract as construed by the parties, and therefore, although defendants in error may from time to time give consent to have other coal delivered over this track, there will be a technical violation of the injunction, and say that Sholl Brothers, or their representatives, have not the right to bind the court that entered this decree for injunction to say when or when not the injunction may be violated, and therefore the decree should have been that coal should not be delivered over this switch except from the Sholl

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mines, or by the consent of Sholl. We think no danger need be apprehended from shipping coal hereafter, as heretofore, over this switch track by the consent of the complainants that procured this decree of injunction, or of the parties acquiring their interest in the matter. Where only private interests are concerned, neither the contracts of parties nor judgments or decrees of the court stand in the way of any action taken by and with the consent of all parties interested.

It is urged by plaintiff in error that the contract is in violation of its duty to serve the public. This contention is necessarily based on the assumption that the switch track in question is a part of a public railroad. Public railroads are declared public highways by section 12, art. XI of the Constitution, and it is there provided that they shall be free to all persons for the transportation of their persons and property thereon under such regulations as may be prescribed by law. Counsel cite *Louisville & N. R. Co. v. Pittsburg & K. Coal Co.*, 111 Ky. 960, which is reported in 55 L. R. A. 601, as decisive of this question. Under the circumstances of that case the track in question was held a part of the railroad as a public highway, and it necessarily followed, as it would in this case if this switch track was a part of the railroad, that a contract so limiting its use is void. Counsel for plaintiff in error say they do not wish this contract to be declared void. There can be no question that a railroad corporation cannot acquire property as a part of its public highway and make valid contracts limiting its use in violation of the constitutional provisions. But it is equally clear that the owners of private property may contract with railroad corporations for switch tracks to be laid over their own private property without submitting those tracks to burdens imposed upon the main lines of railroads. In *Koelle v. Knecht*, 99 Ill. 396, the court construed this section of the Constitution, and said it manifestly refers to railroads con-

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structed for public as contradistinguished from private use; that it is only public railroads that are intended to be regulated, and held that the switch there in question was not of that character. This case has been cited and in this respect approved in *Truesdale v. Peoria Grape Sugar Co.*, 101 Ill. 561; *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 155; *Litchfield & M. Ry. Co. v. People*, 222 Ill. 242, although in those cases the rule was not applied because switches were built in the public street. Cases might arise beginning like the case at bar with a switch track laid and used on the land of a private owner for his own accommodation, extended from time to time with such connections as to make it, in its actual operation, a part of a public highway, and bring it within the provisions of the Constitution, and the fact that the contract in this case provides for other uses of the track than the service of defendants in error raises a fair question in the case whether a public highway was contemplated; but we are of the opinion that the facts in the case bring it within the rule announced in *Koelle v. Knecht*, *supra*, and that the provisions of the Constitution do not apply for the reasons there stated.

The Attorney General of this State has, by leave of this court, filed a brief as *amicus cureae*, in which he calls special attention to the hardship on the State in preventing the use of this switch track by parties other than Sholl Brothers of whom the State authorities may buy coal, and urges the duty of common carriers to impartially serve the public, which we have heretofore discussed. It is true that it would be in the interest of the State to have access to its institution free and open to all parties that might be inclined to supply it with coal, but we are aware of no authority that places the State in a better or different position in this respect from any private property owner that might be similarly situated and, as we have said before, we do not regard the contract as construed by

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the parties to it and by the chancellor as a violation of any public right. The decree is affirmed.

*Affirmed.*

MR. JUSTICE NIEHAUS took no part.

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**Ralph Butler, Appellee, v. David A. Whiteman,  
Appellant.**

**Gen. No. 6,079. (Not to be reported in full.)**

Appeal from the County Court of Henderson county; the Hon. RUFUS F. ROBINSON, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.

**Statement of the Case.**

Action by Ralph Butler, plaintiff, against David A. Whiteman, defendant, in the County Court of Henderson county, to recover on a contract whereby plaintiff did certain plumbing work for defendant. From a judgment for plaintiff, defendant appeals.

It appears that appellant's house had been destroyed by fire, and he required a job of plumbing, and heating pipes and registers for the new house that he was constructing but supposed his old furnace would serve his purpose. He sent appellee specifications that had been prepared for plumbing and heating, and afterwards there was a conference between the parties having these specifications before them, and appellee prepared, signed and handed to appellant a paper writing in which he proposed to do the plumbing work described in detail, and differing somewhat from the description in the specifications, for \$310, one-half payable on arrival of material, and one-half when the job should be completed. Appellant afterwards concluded the old furnace would not serve his purpose and bargained with appellee for new furnace at an agreed

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price of \$64.50. Appellee proceeded with the work, including putting in of the furnace pipes, registers, etc., which is spoken of as a furnace job, and during the progress of the work sent appellant a statement, or bill, as follows:

“½ Plumbing and lighting job	\$310.	\$155.00
½ Furnace job .....		62.50
1 Furnace .....		64.50
		<hr/>
		\$281.50”

which appellant answered, inclosing his check, as follows: “I am enclosing check for \$219.50, which is half your bill of \$310.00 and full pay for new furnace.”

The written proposition did not include the furnace work, but plaintiff testified that later such work was verbally added to the contract at the price sued for, in which testimony he was supported by the testimony of his two daughters who came into the room during the conversation as to such work. Defendant admitted the conversation, but claimed that the price agreed upon for such work was \$125. There was a jury trial in the County Court.

SAFFORD & GRAHAM and JAMES W. GORDON, for appellant.

HARTZELL, CAVANAGH & BABCOCK, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

### Abstract of the Decision.

1. APPEAL AND ERROR, § 1410\*—*when verdict will not be reversed as against weight of evidence.* Although it is the duty of the Appellate Court on appeal from judgment to reverse such judgment, when the verdict on which such judgment is based is “clearly and manifestly” against the evidence, yet, in considering such a

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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judgment, the words "clearly and manifestly" must not be overlooked, and such judgment will not be reversed merely because an examination of the record seems to show that the verdict was not supported by the evidence.

2. EVIDENCE, § 475\*—*when preponderance not determined by number of witnesses.* The question of the preponderance of the evidence cannot be determined merely by counting the witnesses testifying on one side or the other of a cause, although the number of witnesses testifying for and against a given statement of fact is obviously an important consideration in determining the question of preponderance as to such statement.

3. EVIDENCE, § 475\*—*what does not constitute preponderance.* There is no preponderance of evidence where one witness affirms a fact and another denies it if no reason appears for discrediting either witness.

4. CONTRACTS, § 387\*—*when verdict not against manifest weight of evidence.* In an action to recover on a contract for the installation of plumbing work, where the evidence was conflicting, a verdict for plaintiff *held* not clearly and manifestly against the weight of the evidence.

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**Rosa Reeves, Appellee, v. Peoria Railway Company,  
Appellant.**

**Gen. No. 6,082. (Not to be reported in full.)**

Appeal from the Circuit Court of Peoria county; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.

**Statement of the Case.**

Action by Rosa Reeves, plaintiff, against the Peoria Railway Company, defendant, in the Circuit Court of Peoria county, to recover for personal injuries alleged to have been sustained as a result of defendant's negligence as plaintiff was alighting from one of defendant's street cars. From a judgment for plaintiff for \$5,000, defendant appeals.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Plaintiff was at the time of the accident a married woman about thirty-five years old. There is no question that she fell upon the sidewalk striking her back and head and was rendered unconscious, and continued in bed for several weeks, and afterwards a fistula formed which was removed. Two operations are said to have been undergone since the accident, one for fistula and one for removal of the womb. It is not claimed by plaintiff that the conditions necessitating those operations are proven to be attributable to the shock and injury received from the accident, and it is said that any opinion on the subject is purely speculative, but that the severe shock and serious injury she received must have had as much or more to do with bringing about these conditions as anything else. Plaintiff said an operation for fistula was performed by Dr. Hanna September 19, 1910, two years after the accident, and she said another operation was performed by Dr. Meloy in January, 1914. As to the operation of September 19, 1910, Dr. Hanna testified that on that date he operated upon appellee, removing her appendix, both Fallopian tubes, the right ovary, amputated the neck of the womb, fixed up a bad vaginal outlet, and opened a fistula in connection with the anus; that in his opinion the condition which made the operation necessary was due to infection of the tubes and could not be produced by an accidental injury. He also testified that a fall from a car would not tend to produce prolapsus of the womb. Two other physicians testified to the effect that the conditions making necessary these operations could not have resulted from the injury received at the time of the accident. The medical testimony seems to agree that the cause of the condition which made the operation of September 19, 1910, necessary was an infection, perhaps, though not necessarily, of gonorrheal origin.

The claim of each party was supported by clear and direct evidence, plaintiff's evidence making a clear

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case of due care on her part and of negligence on the part of defendant, and defendant's evidence making an equally clear case of due care on its part and of contributory negligence by plaintiff. There was evidence that after the accident plaintiff went to a hospital and received treatment there, and of a bill for the services of a physician which had been incurred by plaintiff, in connection with her injuries, to the amount of \$200, but no competent evidence as to the amount paid for treatment at the hospital.

The case was twice tried, a former judgment for plaintiff for \$600 having been reversed by this court (164 Ill. App. 611) because of errors of law found in the record. The court overruled a motion by defendant for a new trial.

McROBERTS, MORGAN & ZIMMERMAN, for appellant.

DAILEY & MILLER and ROBERT N. McCORMICK, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

### Abstract of the Decision.

1. TRIAL, § 155\*—*when weight of conflicting evidence for jury.* Where the evidence is conflicting, it is the province of the jury to ascertain the truth.

2. WITNESSES, § 259\*—*when credibility of witnesses to accident determined by opportunity for observation.* Conflicting testimony as to an accident may sometimes be reconciled by considering the fact that intelligent people usually make conflicting statements as to an accident involving confusion, and the variance between such statements may be accounted for by the fact that all the witnesses did not have the same opportunities for observing what happened.

3. APPEAL AND ERROR, § 1410\*—*when verdict not against manifest weight of evidence.* In an action to recover for personal injuries sustained by plaintiff while alighting from defendant's street car, which injuries were alleged to be due to defendant's negligence, where the evidence was conflicting, and in a previous trial the jury

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Smith v. Grabbe et al., 196 Ill. App. 325.

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found for plaintiff, a verdict for plaintiff, *held* not so manifestly against the weight of the evidence as to require a reversal, although the reviewing court might entertain another opinion were this the first trial of the cause.

4. STREET RAILROADS, § 131\*—*when evidence sufficient to sustain finding as to serious injury.* In an action to recover for personal injuries alleged to have been sustained by reason of defendant's negligence while plaintiff was alighting from one of defendant's street cars, evidence *held* fairly to prove that plaintiff sustained a serious injury by reason of the accident.

5. DAMAGES, § 114\*—*when verdict for a woman excessive in action against street railroad for personal injuries.* In an action to recover for personal injuries alleged to have been sustained by reason of defendant's negligence while plaintiff, a woman, was alighting from one of defendant's street cars, a verdict for plaintiff for \$5,000 *held* excessive to the extent of \$2,500, where it appeared that plaintiff suffered serious injury by reason of the accident, but where it also appeared that for the most part the disability resulting therefrom was due to causes other than the accident.

6. STREET RAILROADS, § 147\*—*when instruction as to lack of proof of expense due to accident properly refused.* In an action to recover for personal injuries alleged to have been sustained by reason of the negligence of defendant while plaintiff was alighting from one of defendant's street cars, an instruction that plaintiff had produced no competent evidence that she had paid bills for hospital, medical or surgical services, *held* properly refused, where there was evidence tending to show liability and where there was evidence that plaintiff had received such services, although the evidence as to the amount paid therefor was unsatisfactory.

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**Richard A. Smith, Appellee, v. Fred Grabbe et al.,  
Appellants.**

**Gen. No. 6,088. (Not to be reported in full.)**

Appeal from the Circuit Court of Lake county; the Hon. CLAUDE C. EDWARDS, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed October 20, 1915.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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case of due care on her part and of negligence on the part of defendant, and defendant's evidence making an equally clear case of due care on its part and of contributory negligence by plaintiff. There was evidence that after the accident plaintiff went to a hospital and received treatment there, and of a bill for the services of a physician which had been incurred by plaintiff, in connection with her injuries, to the amount of \$200, but no competent evidence as to the amount paid for treatment at the hospital.

The case was twice tried, a former judgment for plaintiff for \$600 having been reversed by this court (164 Ill. App. 611) because of errors of law found in the record. The court overruled a motion by defendant for a new trial.

McROBERTS, MORGAN & ZIMMERMAN, for appellant.

DAILEY & MILLER and ROBERT N. McCORMICK, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

### Abstract of the Decision.

1. TRIAL, § 155\*—*when weight of conflicting evidence for jury.* Where the evidence is conflicting, it is the province of the jury to ascertain the truth.

2. WITNESSES, § 259\*—*when credibility of witnesses to accident determined by opportunity for observation.* Conflicting testimony as to an accident may sometimes be reconciled by considering the fact that intelligent people usually make conflicting statements as to an accident involving confusion, and the variance between such statements may be accounted for by the fact that all the witnesses did not have the same opportunities for observing what happened.

3. APPEAL AND ERROR, § 1410\*—*when verdict not against manifest weight of evidence.* In an action to recover for personal injuries sustained by plaintiff while alighting from defendant's street car, which injuries were alleged to be due to defendant's negligence, where the evidence was conflicting, and in a previous trial the jury

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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found for plaintiff, a verdict for plaintiff, *held* not so manifestly against the weight of the evidence as to require a reversal, although the reviewing court might entertain another opinion were this the first trial of the cause.

4. STREET RAILROADS, § 131\*—*when evidence sufficient to sustain finding as to serious injury.* In an action to recover for personal injuries alleged to have been sustained by reason of defendant's negligence while plaintiff was alighting from one of defendant's street cars, evidence *held* fairly to prove that plaintiff sustained a serious injury by reason of the accident.

5. DAMAGES, § 114\*—*when verdict for a woman excessive in action against street railroad for personal injuries.* In an action to recover for personal injuries alleged to have been sustained by reason of defendant's negligence while plaintiff, a woman, was alighting from one of defendant's street cars, a verdict for plaintiff for \$5,000 *held* excessive to the extent of \$2,500, where it appeared that plaintiff suffered serious injury by reason of the accident, but where it also appeared that for the most part the disability resulting therefrom was due to causes other than the accident.

6. STREET RAILROADS, § 147\*—*when instruction as to lack of proof of expense due to accident properly refused.* In an action to recover for personal injuries alleged to have been sustained by reason of the negligence of defendant while plaintiff was alighting from one of defendant's street cars, an instruction that plaintiff had produced no competent evidence that she had paid bills for hospital, medical or surgical services, *held* properly refused, where there was evidence tending to show liability and where there was evidence that plaintiff had received such services, although the evidence as to the amount paid therefor was unsatisfactory.

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**Richard A. Smith, Appellee, v. Fred Grabbe et al.,  
Appellants.**

**Gen. No. 6,088. (Not to be reported in full.)**

Appeal from the Circuit Court of Lake county; the Hon. CLAUDE C. EDWARDS, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed October 20, 1915.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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### Statement of the Case.

Action by Richard A. Smith, plaintiff, against Fred Grabbe and others, defendants, to recover on a promissory note made by defendants, and indorsed to plaintiff. From a judgment for plaintiff for \$981.17 against four defendants, such defendants appeal.

It was agreed by counsel that the evidence shows that these eight men gave Thompson their three promissory notes, in form joint and several, for \$600 each, due October 1, 1903, 1904 and 1905 respectively; that each of the eight men signed each of the three notes, and none of them signed any other note of that description; that soon after the notes were given, Thompson sold and assigned the two notes last maturing to plaintiff; that those two notes were paid, and there is no question about their genuineness; that afterwards Thompson sold and assigned to plaintiff what purported to be the other of said notes, which is the note sued on; that afterwards it became known to plaintiff and some of the makers of the notes that there were outstanding a dozen or more sets of skilfully forged duplicates of these three notes, and the makers refused to pay the note here in controversy, claiming it to be a forgery. But they have never paid the genuine note of this description.

On September 11, 1913, a few days before the Ten-Year Statute of Limitations would run on this note, this suit was brought and summons issued against seven only of the eight makers of the note (omitting Towner). Afterwards a declaration was filed describing the note in question except the omission of any mention of Towner, and counting on the joint liability of the seven defendants thereon. A true copy of the note, including the signature of Towner, was filed with the declaration as a copy of the instrument sued on. Griffith is a nonresident and was not served with summons. The other six defendants appeared, filed a plea



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of the general issue, and affidavits of each of them denying his signature to the note. A jury was impaneled to try the issues so formed, but during the trial on motion of appellee, a juror was withdrawn and leave given to amend the declaration. (Plaintiff says here that this was done because he then believed that there was a variance between the note offered in evidence and the note described in the declaration.) An amendment to the declaration was filed more than ten years after the note was due, making Towner a codefendant, and describing the note as a joint note of the eight men instead of seven, and counting on the joint liability of the eight men. The pleas on file were allowed to stand to the amendments. No summons was issued for Towner, and, there still being no service on Griffith, the other six defendants are shown by the record proper to have filed a plea of the Ten-Year Statute of Limitations, and it is there shown that the plea was stricken from the files on motion of plaintiff and over the objection of the defendants. No such motion or objection appears in the bill of exceptions. There was a jury trial and a verdict against the eight defendants (including the two not served with summons or appearing) for \$987.75. The court granted a new trial on motion of the six defendants appearing.

There was afterwards another jury trial, and a verdict against the six defendants appearing for \$981.17. No witness testified to the genuineness of the signature of Grabbe and Radke, and after verdict plaintiff dismissed as to them, but did not amend his pleadings. The court overruled the four defendants' motions for a new trial and in arrest of judgment, and entered judgment against them for the amount named in the verdict.

COOKE, POPE & POPE, for appellants.

HEYDECKER & HEYDECKER and GEORGE W. FIELD, for appellee.

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MR. JUSTICE CARNES delivered the opinion of the court.

### Abstract of the Decision.

1. **BILLS AND NOTES, § 421\***—*when evidence of adding of forged signatures immaterial.* Where it is admitted that certain persons signed one note and that they signed no other note, evidence of the adding of forged signatures by some of them to genuine signatures of others is immaterial.

2. **BILLS AND NOTES, § 372\***—*when joint course of action at common law must be proved as alleged.* At common law when a joint cause of action *ex contractu* on a note is alleged, it must be proven as alleged against all the defendants, unless a defense personal to some of them is interposed, or unless some of the obligors are dead, and a judgment in such a cause of action which was not so proven must be reversed unless a recovery in such case is made possible by some statute.

3. **BILLS AND NOTES, § 372\***—*when variance between pleadings and proof in action in which joint judgment entered.* In an action to recover on a promissory note where a joint judgment was entered against four of the makers of such note, it is immaterial that one of the defendants against whom plaintiff recovered is dead, where it appears that the other three against whom plaintiff recovered are alive at the time of the judgment, and it does not appear whether such deceased defendant was dead before the action was commenced.

4. **BILLS AND NOTES, § 335\***—*when all persons severally liable on notes may be joined in one suit.* Under the Negotiable Instruments Act (Hurd's Rev. St., ch. 98, secs. 7a, 7b, J. & A. §§ 7625, 7626), providing that persons severally liable on promissory notes payable in money in certain cases may all or severally be joined in one suit, a plaintiff in an action to recover on such a note may allege the several liability on such note of as many parties as he may choose, and, on joining such parties in one suit, may on proper evidence recover a judgment against the parties joined.

5. **BILLS AND NOTES, § 372\***—*when proof of joint liability required where joint liability alleged.* The Negotiable Instruments Act (Hurd's Rev. St., ch. 98, secs. 7a, 7b, J. & A. §§ 7625, 7626), providing for the joinder in one action in certain cases of parties severally liable on promissory notes, does not abrogate the rule of the common law requiring proof of a joint liability on such notes where such joint liability is alleged.

6. **APPEAL AND ERROR, § 1802\***—*when cause may be remanded to permit amendment of declaration.* Where at the time of the rever-

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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sal of a judgment the statute of limitations has run against the cause of action sued on, the Appellate Court will nevertheless remand the cause to permit amendment of the declaration where such declaration can be amended so as to state a cause of action, notwithstanding the fact that the contemplated amendment may render the declaration liable to a plea of the statute of limitations as stating a new cause of action, as the Appellate Court cannot know that such a plea would be interposed.

7. APPEAL AND ERROR, § 1802\*—*when cause remanded to permit amendment of declaration without considering effect of such amendment.* Where a judgment is reversed because the declaration does not support the judgment, and the cause is remanded to permit an amendment of the declaration so as to state a cause of action, the Appellate Court will not consider whether the contemplated amendment will state a new cause of action and so render the declaration as amended liable to a plea of the statute of limitations where appellant's counsel in argument insists on such question, and where appellee asserts the contrary and further urges that the point was not preserved for review, and where neither party cites authority sustaining his contentions.

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**Simmons Motor Company, Appellant, v. Ruby B. Dudley, Appellee.**

**Gen. No. 6,095. (Not to be reported in full.)**

Appeal from the Circuit Court of Whiteside county; the Hon. ROBERT W. OLMSTEAD, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.

**Statement of the Case.**

Action of replevin by the Simmons Motor Company, plaintiff, against Ruby B. Dudley, defendant, in the Circuit Court of Whiteside county, to recover possession of an automobile. From a judgment for defendant, plaintiff appeals.

There is practically no dispute as to the evidentiary facts. Plaintiff was the agent of the Lewis Motor

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Company, installing local agencies in Illinois and Indiana, and retailing cars in Chicago. A few weeks before the transaction in question it employed Clark as its agent to locate agencies in the State of Illinois, and to obtain orders from agents so procured for at least one car, for which he was directed to require a deposit of a certified check or draft, and send it, with the agency contract, to plaintiff who would ship a car to the local agent. The car in question was furnished Clark by plaintiff, with a chauffeur to drive and take care of it. The list price of the car was \$1,600; dealer's price \$1,250. The car was somewhat worn, the speedometer was broken, but showed it had run 2,300 miles, and plaintiff authorized Clark to sell it to a dealer for \$1,175. Clark was provided by plaintiff with circulars, literature, letter heads and cards used in its business. He went out into the State and after doing some business, reached Sterling, Illinois, where defendant was employed as a stenographer for one Burleigh, manager of the Novelty Iron Works, there located. Burleigh had previous to that time written to plaintiff and to the company they represented with a view to purchasing a car for his own use. Clark visited Burleigh at his office and in the presence of defendant presented the business card of plaintiff on which was printed in the lower left-hand corner, "J. C. Clark, Territory Manager," which words, it seems, were printed there without the knowledge or consent of plaintiff. He stated he had called in answer to Mr. Burleigh's letters about the car, and produced a letter purporting to come from plaintiff and written on plaintiff's stationery, congratulating him on the fine work he was doing and instructing him to sell the car for "I. E. G." He named a price that he said those letters indicated, nine hundred and some odd dollars (the witnesses are not sure as to the exact amount), and said he would take the responsibility of shading it down to \$835. Clark had procured a public stenog-

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rapher to write this letter on plaintiff's letter head without plaintiff's knowledge or consent. Defendant, being present at the time of this transaction with Burleigh, and knowing what there occurred, called on Clark later the same day.

Defendant purchased and paid for the car, and Clark turned over the automobile to her. Plaintiff learned of the transaction when defendant wrote to it concerning defects and missing parts, on which a representative of plaintiff came to Sterling, and had conversation with defendant and Burleigh, after which this action was brought. There was a jury trial and a verdict for defendant.

PHILIP H. WARD and ALBERT J. W. APPELL, for appellant.

J. J. LUDENS, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

### Abstract of the Decision.

1. **PRINCIPAL AND AGENT, § 113\***—*when principal not bound by acts of agent having authority to sell personalty.* The acts of an agent assuming to have authority to sell the personalty of the principal will not bind such principal unless he has actually given such authority, or held the agent out to the public as clothed with such authority, or has done acts which clothe such agent with apparent authority to sell such personalty.

2. **PRINCIPAL AND AGENT, § 113\***—*when agent no authority to sell samples.* A commercial traveler or other similar agent has usually no authority to sell his samples, such authority not being conferred simply by intrusting the possession of such samples to such agent.

3. **PRINCIPAL AND AGENT, § 102\***—*what duty imposed on person dealing with agent to ascertain authority.* A person dealing with an agent must use ordinary prudence and reasonable diligence where the character assumed by such agent is of a suspicious or unreasonable character, or if the authority sought to be exercised is of such an unusual or improbable character as to put an ordina-

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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rily prudent man on his guard, and such person dealing with such agent may not shut his eyes to the obvious facts, but should either refuse to deal with such agent or ascertain the real state of the case from the principal.

4. **PRINCIPAL AGENT, § 245\***—*when question whether defendant in buying from agent exercised prudence to ascertain authority for jury.* In an action of replevin to recover possession of an automobile alleged to have been sold to defendant by an agent of plaintiff who had no authority to make such sale, the question whether defendant in dealing with such agent exercised ordinary prudence and reasonable diligence is a question of fact to be determined by the jury.

5. **PRINCIPAL AND AGENT, § 245\***—*when question whether sale by agent was of such unusual character as to put prudent person on guard for jury.* In an action of replevin to recover possession of an automobile alleged to have been sold to defendant by an agent of plaintiff, who had no authority to make such sale, the question whether the transaction between defendant and such agent was of such an unusual and improbable character as to put an ordinarily prudent man on his guard is a question of fact to be determined by the jury.

6. **PRINCIPAL AND AGENT**—*when evidence sufficient to sustain finding that purchaser from agent acted with prudence.* In an action of replevin to recover possession of an automobile alleged to have been sold to defendant by an agent of plaintiff who had no authority to make such sale, evidence held to show that defendant acted with ordinary prudence and reasonable diligence although she did not investigate to ascertain whether such agent had such authority, he having the automobile in his possession at the time of sale, and it appearing that such agent called on defendant's employer in answer to a letter to plaintiff in regard to such automobile, and there being no facts of a suspicious, unreasonable unusual or improbable character in regard to the transaction which ought to have put defendant on inquiry.

7. **PRINCIPAL AND AGENT, § 102\***—*when purchaser from agent not negligent in failing to ascertain want of authority of agent.* Where an agent who has no authority to sell an automobile which is in his possession offers it for sale to one who does not buy it, but the automobile is finally sold to one who acts on the information as to the authority of the agent which was possessed by the person to whom the automobile was first offered, such person cannot be held negligent in not ascertaining the fact of such agent's want of authority to make the sale if the person to whom it was first offered

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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would not have been held negligent had he purchased the car without ascertaining such fact.

8. **PRINCIPAL AND AGENT**—*when evidence sufficient to sustain finding that ordinarily prudent person would have made check for purchase payable to agent.* In an action of replevin to recover possession of an automobile alleged to have been sold to defendant by an agent of plaintiff, who had no authority to make such sale, where defendant, a stenographer, paid such agent the purchase price thereof in money and drafts payable to the order of such agent, *held* that there was no reason for disturbing a verdict for defendant in so far as it rested on a finding that an ordinary prudent man would have paid for the automobile in the way in which defendant paid, instead of drawing a check payable to the order of the principal as a careful business man would have done.

9. **PRINCIPAL AND AGENT, § 131\***—*when payment to agent taking order invalid.* Payment for goods ordered on future shipment is not valid as against the principal when made to a traveling salesman who takes orders for such goods.

10. **PRINCIPAL AND AGENT, § 131\***—*when agent implied authority to receive payment.* Generally an agent in possession of goods has an implied authority to receive payment therefor when sold by him.

11. **PRINCIPAL AND AGENT, § 103\***—*when purchaser charged with notice as to lack of authority of agent.* One dealing with an agent selling goods by sample is charged with notice that samples are not generally placed in the hands of the agent for sale.

12. **PRINCIPAL AND AGENT, § 165\***—*when principal estopped to deny lack of authority of agent to sell.* Although an agent cannot usually bind his principal beyond his authority, yet where the true owner of property holds out, or allows another to appear as being the owner or as having full power of disposition of the property whereby innocent third parties are led into dealing with such apparent owner, such third parties will be protected if they buy such property from such supposed owner, their rights in such case depending not on the actual title or authority of the person with whom they deal directly, but on the act of the owner which precludes him from disputing, as against such third parties, the existence of the title or power with which he has caused or allowed the party making the conveyance to appear to be invested.

13. **TRIAL, § 150\***—*when question of fact arises for jury.* Although in the trial of an action there is no dispute as to what the parties actually said and did in the transaction which gave rise to the action, yet where there are conclusions of fact to be drawn from the admitted facts there are still questions for the jury to determine,

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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so that in such case it is not merely a question of applying the law to the facts.

14. **TRIAL, § 191\***—*when evidence not sufficient to warrant direction of verdict.* In an action of replevin to recover possession of an automobile alleged to have been sold to defendant by an agent of plaintiff, who had no authority to make the sale, evidence *held* not sufficiently clear to warrant the direction of a verdict, although there was no dispute as to what the parties actually said and did in the transaction on which the action was founded.

15. **REPLEVIN, § 123\***—*when verdict not so clearly against weight of evidence as to indicate bias.* In an action of replevin by a non-resident corporation to recover possession of an automobile alleged to have been sold to defendant, a woman, by an agent of plaintiff who had no authority to make the sale, judgment for defendant *held* not so manifestly against the weight of the evidence as to indicate that the jury were biased because plaintiff was a nonresident corporation and defendant was a woman.

16. **APPEAL AND ERROR, § 866\***—*what abstract of record should contain.* On appeal the appellant must present in his abstract of the record the matter relied on for reversal, as a reviewing court will not go into an examination of the record to see if errors have been committed in regard to matters not abstracted.

17. **REPLEVIN, § 147\***—*when instruction as to authority of agent not misleading.* In an action of replevin to recover possession of an automobile alleged to have been sold to defendant by an agent of plaintiff, who had no authority to make such sale, but where such agent had such automobile in his possession at the time the sale was made, and it appeared that defendant made no investigation as to such agent's authority before purchasing, an instruction telling the jury to inquire whether plaintiff, by its actions, justified defendant in thinking that such agent had such authority, *held* not misleading open to criticism, in that it did not direct the jury to inquire whether a "reasonably prudent man," or person described by some similar expression, would have been, under the circumstances named, justified in thinking such agent had such authority.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Edmondson v. Pfeiffer, 196 Ill. App. 335.

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**George E. Edmondson for use of Warner's Features, Inc., Appellant, v. Rudolph Pfeiffer, Appellee.**

**George E. Edmondson for use of Kingan & Company, Ltd., Appellant, v. Rudolph Pfeiffer, Appellee.**

**Gen. No. 6,098. (Not to be reported in full.)**

Appeal from the Circuit Court of Peoria county; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.

### **Statement of the Case.**

Garnishment by George E. Edmondson, plaintiff, for use of Warner's Features, Inc., and by George E. Edmondson for use of Kingan & Company, Ltd., a corporation, against Rudolph Pfeiffer, in the Circuit Court of Peoria county. From a judgment for garnishee, plaintiff appeals.

KIRK & SHURTLEFF, for appellant.

EVANS & EVANS, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

### **Abstract of the Decision.**

CONTRACTS, § 349\*—*when money due on contract can be recovered only by persons for whose benefit contract made.* In an action of garnishment where the funds sought to be garnished as belonging to defendant were paid to him under a written building contract whereby garnishee promised to pay to defendant the amount of his pay roll for the preceding week as shown by an itemized statement of the amount paid for all labor employed by him during the week on such buildings, and that on the following Monday defendant should furnish garnishee with a receipt in full payment for labor performed by each workman during such week, and which contract further provided that the clause referred to should be construed to mean that such amount was delivered to defendant for the express purpose of paying such pay roll, and not in any sense

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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as a payment to defendant, who was forbidden thereby to use the amount for any other purpose, a ruling of the trial court construing such contract as creating a liability in favor of the workmen named in the pay roll *held* not erroneous, there being a direct promise to pay such amount for the benefit of such workmen, and it being probable that the clause was inserted in the contract to protect garnishee against liens which might have been preserved but for such payment.

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**W. J. Brennan v. William P. McEvoy & Company.  
F. J. Lewis Manufacturing Company, Appellant, v.  
Western Clock Company, Appellee.  
Gen. No. 6,101.**

1. **MECHANICS' LIENS, § 76\***—*when material men protected by notice of claim furnished to owner by contractor.* Under section 5 of the Mechanics' Liens Act of 1903 (J. & A. ¶ 7143), requiring an owner before making payment to a contractor to require of such contractor a verified statement in writing of the names of all parties furnishing material or labor, with the amounts due or to become due, a statement voluntarily furnished to the owner by the contractor, if sufficient to comply with the statute, will protect a material man named in such notice.

2. **MECHANICS' LIENS**—*when notice of claims furnished by contractor to owner insufficient.* Under section 5 of the Mechanics' Liens Act of 1903 (J. & A. ¶ 7143), requiring certain notice to be given to an owner before any payments are made to a contractor, a notice which fails to set out the amount due or to become due to any person furnishing labor or material named in such statement is insufficient to comply with the statute.

3. **MECHANICS' LIENS, § 73\***—*what is effect of owner making payment to contractor without receiving statement of claims.* An owner who makes payment to a contractor without requiring or receiving from such contractor a statement as required by section 5 of the Mechanics' Liens Act of 1903 (J. & A. ¶ 7143), does so at his peril.

4. **MECHANICS' LIENS, § 6\***—*necessity that statute be followed.* One claiming a mechanic's lien must rely wholly on the statute for his recovery, since such liens are not recognized either at common law or in equity in the absence of statute.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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5. **MECHANICS' LIENS, § 5\***—*statute strictly construed.* Since mechanics' liens are unknown at common law or in equity, a statute giving such right must be strictly construed, and one claiming such a lien must show a compliance with the provisions of such statute.

6. **MECHANICS' LIENS, § 73\***—*when act of builder making payment to contractor without requiring statement of claims of no avail against subcontractor.* A builder who makes payment to a contractor without requiring the statement required in section 5 of the Mechanics' Liens Act (J. & A. ¶ 7143) cannot claim credit for the amounts of such payments as against a subcontractor, where it affirmatively appears that the subcontractor gave the notice required by section 32 of the same act (J. & A. ¶ 7162).

7. **MECHANICS' LIENS**—*when owner may rely upon statement of claims furnished by contractor as against subcontractor.* Under section 32 of the Mechanics' Liens Act of 1903 (J. & A. ¶ 7162), a subcontractor may bind the owner by giving the notice provided by such statute notwithstanding that a notice has been given by the contractor under section 5 of the same act (J. & A. ¶ 7143), but in the absence of any such notice by such subcontractor the owner has the right to rely on such statement furnished by the contractor unless such owner knows from any source that the statements in such notice by the contractor are false, but in such case such subcontractor is protected to the extent, if any, to which an amount is named in such notice as due or to become due to such subcontractor.

8. **MECHANICS' LIENS**—*when duty of subcontractor to see that notice furnished by contractor to owner is complete.* Under sections 5 and 32 of the Mechanics' Liens Act of 1903 (J. & A. ¶¶ 7143, 7162), a subcontractor, if he fails to furnish to the owner a sufficient notice as required by such section 32, has the burden of seeing that a notice has been furnished by the contractor to such owner under such section 5, which is sufficient to protect such subcontractor.

9. **MECHANICS' LIENS, § 61\***—*when subcontractor's right to lien not defeated by failure of owner to obtain from contractor statement of claims before paying contractor.* Under sections 5 and 32 of the Mechanics' Liens Act of 1903 (J. & A. ¶¶ 7143, 7162), the right of a subcontractor to a lien cannot, where both owner and subcontractor fail to comply with the statute, be made dependent on the omission of the owner to perform the duty of requiring from the contractor, before making payment to him, of a statement showing the claims of subcontractors and of those furnishing material or labor, together with the amounts due or to become due as required by such section 5, since the purpose of the statute was both to

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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give notice to the owner of liens which might be established against his premises and to protect the claimants of such liens.

Appeal from the Circuit Court of La Salle county; the Hon. EDGAR ELDRIDGE, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.

**McENIRY & McENIRY**, for appellant.

**CLARENCE GRIGGS and J. E. COLEMAN**, for appellee.

**MR. JUSTICE CARNES** delivered the opinion of the court.

Appellee, Western Clock Company, in the spring of 1912, contracted with Wm. P. McEvoy & Company, builders, for the erection of a building on its premises in the City of Peru, Illinois, and an addition thereto, for the agreed price of \$103,669.14. In the course of construction the builder became indebted to one Brennan for labor, and also to F. J. Lewis Manufacturing Company, the appellant, in a balance of \$1,043.68 for material furnished on and prior to December 27, 1912. Brennan on May 28, 1913, filed a petition for a mechanic's lien upon the premises, making Wm. P. McEvoy & Company and the Western Clock Company parties defendant. Appellant filed an intervening petition setting up its claim, October 18, 1913, and filed an amendment thereto April 1, 1914. The cause was submitted to the master in chancery, who took proofs and reported the same to the court with his conclusion that appellant was not entitled to a lien on the premises because it did not comply with the statute requiring it to serve notice of its claim on the owner. The chancellor sustained the master's report and entered a decree (which recites that it is based on the master's report and on oral and documentary evidence) dismissing appellant's petition, from which decree this appeal is taken.

There is no dispute about the facts. The controversy arises over the construction of three sections of our Mechanics' Liens Act of 1903. Section 5 of that Act (J. & A. ¶7143) makes it the duty of the owner to require of the contractor, before making any payment to him, a verified statement in writing of the names of all parties furnishing material or labor, and of the amounts due or to become due, each.

Section 32 (J. & A. ¶7170) provides that no payments to the contractor shall be regarded as rightfully made as against the subcontractor, laborer or party furnishing labor or materials if made by the owner without exercising and enforcing the rights and powers conferred upon him in section 5 of the Act.

Section 24 (J. & A. ¶7162) provides that subcontractors, or party furnishing labor or material, may at any time after making his contract with the contractor, and shall within sixty days after the completion thereof, cause a written notice of his claim, and the amount due or to become due thereunder, to be personally served on the owner or his agent: Provided, such notice shall not be necessary when the statement of the contractor provided for in section 5 shall serve to give the owner notice of the amount due and to whom due, but where that statement is incorrect as to the amount, the subcontractor or material man shall be protected to the extent of the amount there named as due or to become due to him.

Appellant did not serve any notice in compliance, or attempted compliance, with section 24. The owner did not demand of the builder a schedule under section 5, but the builder furnished him, the owner, two schedules in attempted compliance with the provisions of that section, the first of which is admittedly bad and to be disregarded. The second was furnished February 20, 1913, and purported to be a verified statement in writing of the names and addresses, not only of all parties furnishing material or labor and the amount

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due, but also the names of parties who had made bids or proposals for subcontracts or for material, and the amount of such bids or proposals where same have not been let or accepted. There were seventeen of those items set out in the statement, one of them being, F. J. Lewis Manufacturing Co., \$1,150, tar, and nothing in the statement from which it could be ascertained whether F. J. Lewis Manufacturing Company was one of the parties that had a subcontract, or one of the parties who had made a bid that had not been accepted. It is suggested by appellant, though not much argued, that this statement should be construed as a compliance with said section 5, which not only makes it the duty of the owner to require a statement, as before pointed out, but also makes it the duty of the contractor to give the owner a statement. It is true if a statement in compliance with the provisions of section 5 had been voluntarily furnished the owner by the builder, appellant would have been protected thereby, and it is therefore material whether this was such a statement. Appellee argues that it was not for several reasons, among them the reason above suggested that it cannot be construed as a notice that any amount was due or to become due the appellant. We think the point well taken, and without discussing other suggestions of appellee as to the sufficiency of the statement under the statute, we hold that it was not a compliance with the statute, and that the case must be considered as though no notice of appellant's claim had been served by the builder on the owner.

The owner had, before the commencement of this suit, paid to the contractor, and on his account to various subcontractors and laborers, sums of money at various times amounting to its full indebtedness, and all was paid before the 20th of February, 1913, the date when the above statement that we have held



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bad was served on the owner, except one item of \$900 paid March 25, 1913, to a subcontractor.

As we have seen, the Mechanics' Liens Act of the Legislature provides, in substance, that an owner making payments to the original contractor, without requiring or receiving from such contractor a statement of the claims of subcontractors, does so at his peril, and also provides that a subcontractor wishing to avail himself of the benefits of the act must serve a notice of his claim on the owner within a time and in a manner provided. What are the rights of the owner and the subcontractor if neither has complied with the above provisions of the statute is the question here presented. Appellant must rely entirely on the statute for his right of recovery. Mechanics' liens are not in the absence of statute recognized by the common law or in equity. Therefore the statute must be strictly construed. *Turnes v. Brenckle*, 249 Ill. 394; *Schmidt v. Anderson*, 253 Ill. 29; *LaCrosse Lumber Co. v. Grace M. E. Church*, 180 Ill. App. 584. A party securing a lien under the Mechanic's Lien Law must show compliance with its provisions. *Cary-Lombard Lumber Co. v. Fullenwider*, 150 Ill. 629. Our Supreme Court held, construing the Mechanics' Liens Act as amended in 1887, which provided for statements to be made to the owner by both the contractor and the party desiring a lien, that while the owner had the right to refuse payment until the contractor furnished the statement required by law that the right of the subcontractor to a lien did not depend upon the omission of the owner to do or perform any act, but did depend upon something he, the subcontractor, must himself do unless the necessity was avoided by the act of the original contractor in furnishing the sworn statement. *Butler & McCracken v. Gain*, 128 Ill. 23. But that act was not, in these respects, identical with that of 1903. We are referred to no case, and know of none, directly determining the question here presented as

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to the construction of the Act of 1903. It is claimed by appellant's counsel that the question was presented to the Supreme Court in *Rittenhouse & Embree Co. v. Warren Const. Co.*, 264 Ill. 619, and was not passed on because the case was decided on other grounds. It appears on page 623 of the opinion that the builder made payments to the contractor without obtaining statements from the contractor, as provided in section 5, and the trial court held under the provisions of sections 21 and 32 (J. & A. ¶¶ 7159, 7162) that the builder could not claim credit against the subcontractor because of that fact, but it does not appear that the subcontractor had failed to make the statement provided in section 24. If it did so appear the case would be authority in support of appellant's contention here, for the court said on page 620: "There is no controversy \* \* \* that appellee took all of the necessary steps to perfect a mechanic's lien under the Mechanic's Lien Law of 1903." In the case of the *American Radiator Co. v. Blakie*, 165 Ill. App. 404, sections 5 and 32 of the Act are quoted and commented upon, and it is said that the builder, not having required the statement provided in section 5, did not, by payment of the amount due the original contractor, relieve his property from a lien in favor of the subcontractor there under consideration. But it affirmatively appears in that case that the subcontractor had complied with section 24 in giving notice of his claim to the owner. It is held in *Knickerbocker Ice Co. v. Halsey Bros.*, 262 Ill. 241, that where a subcontractor does not serve the notice required of him, the owner has a right to rely upon an original contractor's statement furnished under section 5. In that case the owner had acted on such statements and they were false, and the court said on page 245: "If any subcontractor is not satisfied to rely upon the contractor in the making of these statements and to abide by the statements as made, it is his privilege, under the

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statute, to serve an independent notice upon the owner, of the amount due or to become due under his subcontract, which shall bind the owner notwithstanding any statement made by the contractor. In the absence of any such notice served by the subcontractor the owner has the right to rely and act upon the sworn statements made to him under said section 5 by the contractor, unless he knows, from any source, that the same are false.”

It is therefore settled law that in case the subcontractor makes no statement under section 24, and the original contractor makes false statement under section 5, the owner is protected in acting on that false statement, but the subcontractor is protected to the extent of any amount named in such false statement as due or to become due to him. To this extent the burden is placed on the subcontractor to see that a correct statement is made by the original contractor to the owner, and, if so made, there is no necessity for him, the subcontractor, to protect himself by complying with the provisions of section 24. But if a false or incorrect statement is made under section 5, then the subcontractor must protect himself by making the statement required by section 24. It seems to us reasonably to follow that if the subcontractor makes the necessary investigation as to the statement furnished by the original contractor to the owner, and instead of learning that a false statement to his detriment has been made, he learns that no statement in compliance with the law has been made, that he should then be required to make the statement provided in section 24. That section does not, in terms, limit the requirement to cases where the original contractor's statement is incorrect. It absolutely requires the subcontractor to make it as a condition precedent to establishing his lien. It is easily perceived why he should be relieved from making it if the owner was already furnished by the original contractor's state-

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ment with the information required to be given him by the subcontractor. The purpose of these enactments was to give the owner notice of claims that might be the foundation of liens against his premises, and also to protect such claimants, and it does not seem to us that a subcontractor, himself in default in observing the mandate of the statute, should be permitted to establish a lien against the owner on the ground that he, the owner, was also in default in observing a statutory requirement, which observance might have apprised him of the subcontractor's claim and relieved the subcontractor of the statutory duty imposed upon him.

We are of the opinion that under the Act of 1903, as well as under the law in force in 1887, the right to a lien cannot be made to depend alone upon the omission of the owner to do or perform the duty imposed upon him by the statute.

Appellee suggests other reasons for affirming the decree which may have some force, but we are asked by both parties to construe this statute, and have concluded to let our decision rest on that ground. The decree is affirmed.

*Affirmed.*

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**Emma Kime, Appellee, v. Samuel Kime, Appellant.**

**Gen. No. 6,104. (Not to be reported in full.)**

Appeal from the Circuit Court of Grundy county; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.

### **Statement of the Case.**

Bill for separate maintenance by Emma Kime, complainant, against Samuel Kime, defendant, in the Cir-

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cuit Court of Grundy county, on the ground of cruel and abusive treatment and other misconduct. From a decree in favor of complainant, defendant appeals.

The answer denied and explained the charges, and accused complainant of much wrongdoing. There was a jury trial and a verdict for the complainant and finding that at the time of filing her bill of complaint she was, and that she now is, living separate and apart from her husband without her fault.

CORNELIUS REARDON and FRANK L. FLOOD, for appellant.

CLYDE H. THOMPSON and FRANK H. HAYES, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

### Abstract of the Decision.

1. HUSBAND AND WIFE, § 264\*—*when evidence sufficient to sustain verdict on bill for separate maintenance.* In a bill for separate maintenance on the ground of cruel and abusive treatment, a verdict and finding for complainant held sustained by the evidence.

2. APPEAL AND ERROR, § 1401\*—*when verdict will not be disturbed on appeal.* In an action where the finding made depended largely on the opportunity which the court and jury had of judging of the credibility of the witness, such finding will not be disturbed on review in the absence of substantial error of law found in the record.

3. APPEAL AND ERROR, § 1491\*—*when failure to exclude question not prejudicial error.* Although a question is leading and suggestive, the failure of the court to exclude the question will not be deemed to be substantial error, where an examination of the testimony shows that defendant was not prejudiced by the ruling of the trial court in permitting the question to be answered.

4. INSTRUCTIONS, § 109\*—*when instruction not improperly refused because not applying the pleadings.* In a bill for separate maintenance, where defendant's pleadings did not charge complainant with adultery, and where defendant as a witness expressly disclaimed such charge, an instruction informing the jury of the evi-

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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dence necessary to establish such charge and the effect of a condonation of the offense, *held* proper where the attention of the jury was directed to the question whether complainant had been guilty of adultery by defendant's introduction of evidence tending to show that he had grounds for being jealous of complainant.

5. HUSBAND AND WIFE, § 267\*—*what is effect of errors on trial by jury in suit for separate maintenance.* Since in a separate maintenance proceeding the verdict of a jury is merely advisory, which the court may disregard and enter such decree as in his judgment equity demands, questions of errors of law, in rulings on evidence, and in instructions are of less importance than in a common law or divorce proceeding, where a jury trial is a matter of right.

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**Ernest L. Erickson, Administrator, Appellee, v. American Well Works, Appellant.**

**Gen. No. 6,107.**

1. WORKMEN'S COMPENSATION ACT—*what is effect of lack of negligence or lack of due care upon right to recovery.* Under the Workmen's Compensation Act (J. & A. ¶ 5449 *et seq.*), it is not necessary to a recovery that the accident should have been caused by the negligence of the master or that the servant should have been in the exercise of due care when injured.

2. NEGLIGENCE, § 66\*—*what constitutes contributory negligence.* Where a person is injured as a result of his negligence or want of due care, such person is always carelessly doing something which a prudent man would not have done under similar circumstances, or omitting something which reasonable prudence requires of such person.

3. WORKMEN'S COMPENSATION ACT—*when employee right to recover although his negligence proximate cause of injuries.* Under the Workmen's Compensation Act (J. & A. ¶ 5449 *et seq.*), a recovery cannot be denied although it is possible or even probable that the proximate cause of the injuries for which compensation is sought was the negligence of the claimant.

4. WORKMEN'S COMPENSATION ACT, § 11\*—*what is effect upon right to recover compensation of performing act outside course of employment.* Under the Workmen's Compensation Act (J. & A. ¶ 5449 *et seq.*), compensation cannot be recovered for injuries resulting to

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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an employee while engaged in acts not in the course of his employment.

5. **WORKMEN'S COMPENSATION ACT, § 11\***—*when employee putting head out of moving elevator engaged in usual course of employment.* In an action under the Workmen's Compensation Act (J. & A. § 5449 *et seq.*), to recover compensation for the death of a plaintiff's intestate as a result of being caught in an elevator shaft in a building where he was employed by defendant, which elevator decedent was operating at the time of the accident, being engaged in hoisting certain frames from one floor of the building to another by means of such elevator, *held* that at the time of the accident decedent was engaged in the usual course of his employment, although there was evidence that decedent put his head out of the door of the moving elevator and thereby contributed to the injury sustained, such evidence being construable merely as indicating a want of due care.

6. **WORKMEN'S COMPENSATION ACT**—*when yearly earning power properly computed.* In an action under the Workmen's Compensation Act (J. & A. § 5449 *et seq.*), to recover for the death of plaintiff's intestate as a result of injuries sustained in an accident occurring while decedent was in the employ of defendant, where it appeared that at the time of his death decedent was twenty-two years of age, of more than average education, and had been working for defendant at various times and in various capacities for five years prior to the accident, his last employment by defendant commencing two weeks before the accident and involving duties mainly of superintendence at a wage of \$3 per day, a finding which computed the yearly earning power of decedent under clause d of section 6 of such act (J. & A. § 5455), providing that in certain cases such earning power may be computed by taking three hundred times the average amount earned by decedent during the days preceding the accident, *held* not erroneous, and that the result attained was fair and reasonable.

7. **WORKMEN'S COMPENSATION ACT**—*when substantial damage presumed from relationship.* The law will presume from relationship alone that a wife, child or parents of a decedent will suffer some substantial damage as a result of the death of such decedent.

8. **STATUTES, § 203\***—*what is effect of punctuation in construing statutes.* The punctuation used in a statute is helpful in its construction although such punctuation does not control such construction.

9. **WORKMEN'S COMPENSATION ACT, § 10\***—*when son contributes to support his parents.* A son living with his parents and paying them for his board and lodging at a price ordinarily paid for such board

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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and lodging at boarding houses is contributing to the support of such parents.

10. **WORKMEN'S COMPENSATION ACT, § 1\***—*how construed relative to contribution to support of parents.* In an action under the Workmen's Compensation Act (J. & A. ¶ 5449 *et seq.*), to recover for the death of plaintiff's intestate as a result of an accident occurring while decedent was in the employ of defendant, such action being brought for the benefit of decedent's father, the words "to whose support he has contributed within five years previous to his death" in clause a of section 4 of the Act (J. & A. ¶ 5452), *held* to qualify the word "parents" as well as the words or other "lineal heirs," also found in such clause of such section, there being no comma after the word "parents" and before the words "lineal heirs," for which reason the section requires, as a prerequisite to a recovery in behalf of parents, evidence that decedent had contributed to the support of such parents within five years prior to his death, and such construction is not affected by the fact that similar language is used in clause 1 of section 5 of such Act (J. & A. ¶ 5453), relating to the payment of compensation accruing in the lifetime of the employee in case of his death before the total of the payments equals the amount of a death benefit, wherein the word "parents" is separated from the words "or other lineal heirs" by a comma.

11. **WORKMEN'S COMPENSATION ACT, § 10\***—*when son contributing to support of parents.* In an action under the Workmen's Compensation Act (J. & A. ¶ 5449 *et seq.*), to recover compensation for the death of plaintiff's intestate as a result of an accident happening while decedent was employed by defendant, *held* that decedent was contributing to the support of parents within the meaning of section 5 of such act (J. & A. ¶ 5452), fixing the amount of compensation to be recovered in case of the death of an employee who "leaves \* \* \* parents \* \* \* to whose support he had contributed within five years previous to his death," where it appeared that within the time named decedent had resided with his parents and paid to them an amount equal to that usually paid for board and lodging in boarding houses, and that decedent later increased the amount paid such parents in consideration of the necessities of such parents.

12. **WORKMEN'S COMPENSATION ACT, § 12\***—*when evidence of habits of employee admissible.* In an action under the Workmen's Compensation Act (J. & A. ¶ 5449 *et seq.*), to recover for the death of plaintiff's intestate as a result of injuries sustained by being caught in an elevator shaft in a building where decedent was employed by defendant, and was at the time of the accident operating such elevator, such action being tried by the court without a

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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jury, evidence of the careful habits of deceased *held* competent, though there were eyewitnesses of the accident.

Appeal from the Circuit Court of Kane county; the Hon. CLINTON F. LEWIN, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915. *Certiorari* denied by Supreme Court (making opinion final).

J. C. MURPHY and E. L. LYON, for appellant.

JOHN M. RAYMOND and JOHN K. NEWHALL, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

John O. Erickson, appellee's intestate, while in the employ of the American Well Works, the appellant, on July 16, 1912, was caught in the shaft of an elevator that he was operating and received an injury that caused his instant death. These parties were subject to the provisions of the Workmen's Compensation Act approved June 10, 1911, in force May 1, 1912 (Jones & Addington's Annotated Statutes, vol. 3, page 2914, ¶5549 *et seq.*). It is not the act now in force. There was an arbitration under the provisions of the statute, and an appeal to the Circuit Court, where a jury was waived and the case tried by the court who entered a judgment against appellant for \$3,500, to be paid in instalments as in the act provided, from which judgment this appeal is prosecuted.

Under this statute to warrant a recovery the injury sustained by the employee must be one "Arising out of and in the course of the employment." The amount and manner of payment of compensation for an injury resulting in death is provided in section 4 of the Act (J. & A. ¶5452), and is as follows: "a. If the employé leaves any widow, child or children, or parents or other lineal heirs to whose support he had contributed within five years previous to the time of his death, a sum equal to four times the average annual

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earnings of the employé, but not less in any event than one thousand five hundred dollars, and not more in any event than three thousand five hundred dollars. Any weekly payments, other than necessary medical or surgical fees, shall be deducted in ascertaining such amount payable on death.

“b. If the employé leaves collateral heirs dependent upon his earnings, such a percentage of the sum provided in section “a” as the contributions which deceased made to the support of these dependents, bore to his earnings.

“c. If the employé leaves no widow or child or children, parents or lineal or collateral heirs dependent upon his earnings, a sum not to exceed one hundred and fifty dollars for burial expenses.

“d. All compensation provided for in this section to be paid in case injury results in death, shall be paid in installments equal to one-half the average earnings, at the same intervals at which the wages or earnings of the employé were paid while he was living; or if this shall not be feasible, then the installments shall be paid weekly.

“e. The compensation to be paid for injuries which result in death, as provided for in this section, shall be paid to the personal representative of the deceased employé and shall be distributed by such personal representative to the beneficiaries entitled thereto, in accordance with the laws of this State relating to the descent and distribution of personal property.” There follows a clause in section 5 (J. & A. ¶ 5453), to which our attention is called as perhaps bearing on the construction of the above-quoted statute, which is as follows: “Death. (1) In case death occurs before the total of the payments made equals the amount payable as a death benefit, as provided in section 4, article a, then in case the employé leaves any widow, child or children, or parents, or other lineal heirs, they shall be paid the difference between the compensation for

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death and the sum of such payment, but in no case shall this sum be less than \$500.00.”

The basis for computing compensation is given in section 6 of the Act (J. & A. ¶ 5455). The part of the section necessary to be considered here reads as follows: “a. The compensation shall be computed on the basis of the annual earnings which the injured person received as salary, wages or earnings in the employment of the same employer during the year next preceding the injury.

“b. Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the employé was employed at the time of the accident, uninterrupted by the absence from work due to illness or any other unavoidable cause.

“c. The annual earnings if not otherwise determinable shall be regarded as 300 times the average daily earnings in such computation.

“d. If the injured person has not been engaged in the employment for a full year immediately preceding the accident, the compensation shall be computed according to the annual earnings which persons of the same class in the same or in neighboring employments of the same kind have earned during such period. And if this basis of computation is impossible, or should appear to be unreasonable, three hundred times the amount which the injured person earned on an average on those days when he was working during the year next preceding the accident, shall be used as a basis for the computation.”

There is no dispute about the material facts. John O. Erickson, the deceased, was, on the day of the fatal accident, an unmarried man twenty-two years old, and had then been working for appellant about two weeks in moving patterns from one building to another. There was a great number of these patterns of various sizes, from a few inches to several feet in diameter, and some of them were carried to the upper floor of

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the building to which they were moved by means of an elevator. He was furnished two men, who, under his direction, did most of the manual labor. His principal duty was to keep track of the patterns, check them up, and keep a record of where they were placed. He had theretofore used the elevator in which the accident happened, operating it himself, in the course of such employment, and was so using it at the time of the injury. In years past deceased had attended high school for two years but did not graduate. Worked for some time for a printing company and five or six years for appellant. Attended school at Rock Island a year immediately before going to work for the appellant the last time. He intended to enter the ministry, which would require three or four years more of schooling. At the time of his injury he was earning \$3 a day. He had never earned higher wages. During the five years before his death his home had been in his father's family, consisting of the father, and mother, himself and his two brothers, until November, 1910, when the mother died. The father and mother kept house and the three boys lived with them. The boys were all engaged in some kind of employment. The father was sixty-one years old, a laborer, at wages ranging from \$1.75 to \$2.20 a day, and had no means of support other than his wages and what his children might aid him. After the mother died, a relative kept house for them about a year, and then the housekeeping was abandoned and the boys rented rooms elsewhere from September, 1911, to the time of the death. While the family lived together deceased paid his parents for a time \$4 a week for his board, room and washing, but three or four years before the accident he began paying \$5 a week for the same service because he thought it necessary that they have more support. This was the only way that he contributed to the expense of the family. The amount that he so

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paid was not in excess of the usual price in that community for what he received therefor.

There was no eyewitness to the accident, and uncontradicted evidence was introduced that deceased was a man of careful habits. The elevator had, a short time before the accident, been installed in a four-story building and was operated by the party using it. There is some evidence that the operator might get an electric shock in using the elevator. The evidence does not show negligence of the appellant contributing to the accident, and there is some ground for the inference that deceased may have carelessly put his head out of the elevator door while it was moving, and himself have been guilty of contributory negligence in so doing that would preclude a recovery in the absence of this statute even had appellant been negligent.

It is not necessary to a recovery under the provisions of this statute that the injury be the fault or negligence of the master or that the injured party be in the exercise of ordinary care. Appellant admits this, but says that notwithstanding these provisions of the law, a servant, while in the employment of his master, may be injured by his own act that is so reckless and unnecessary that it cannot be said that the act was performed in the course of his employment and that this is such a case, and he cites authorities in support of that proposition of law and we presume it is good law. Among the authorities so cited is the case of *Brown v. City of Decatur*, 188 Ill. App. 147. The court there cited and discussed several authorities on that question, and said: "The criterion is, what was the deceased doing, and not what was the manner in which he was doing it," and held under the circumstances of that case that the injury was received in the course of the servant's employment. In case of an accident resulting from the want of due care, in other words negligence, of the injured party, he is always carelessly doing something that a prudent man

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would not do under the circumstances, or failing to do something that reasonable prudence requires of him. This statute, as we have seen, gives a right of recovery notwithstanding the negligence of the injured party, and to give the statute any effect the right of recovery must not be denied because it is possible or even probable that the proximate cause of the injury was the negligence of the claimant. We presume, using an extreme illustration, had deceased deliberately attempted to descend from the fourth floor to the first floor of the building by jumping down the elevator shaft instead of using the elevator, that it would have been a reckless act that could not be said to be performed in the course of his employment, and that no doubt less marked acts of recklessness might be so considered; but we are of the opinion that the facts in this case, under the authorities cited, and particularly under the authority of *Brown v. City of Decatur, supra*, and the authorities there discussed and reviewed, do not bring the case within that class, but at most can only be construed as indicating a want of due care by the deceased.

Under the provisions of section 6, before quoted, as deceased had not been employed by appellant during the year next preceding the accident, it was necessary to make the computation under clause d of that section and base the finding on the annual earnings of persons of that class, or if that should appear to be unreasonable, three hundred times the amount which the injured person earned on an average in those days when he was working during the year next preceding the accident. The court evidently used the last-suggested basis and found an annual earning of \$900 a year on the basis of \$3 a day, that deceased had been earning immediately before the accident. This action of the court is complained of, and appellant insists that under the facts the finding of earnings could only have been based on the annual earnings of



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persons of that class; that there was no evidence of such annual earnings, and therefore no basis in the testimony for a finding of \$900 a year. We do not think the court erred in this respect. It would not have been easy, and perhaps not "reasonable," to undertake to find what people in that class were earning. The work at which deceased was employed was not a common every-day work in which wages could be easily ascertained and proven, and while it is true that it would be unfair to base annual earnings on what an employee had been receiving for a short time before his injury at some unusual and perhaps high priced employment, it is a matter of common knowledge that the wages of 30 cents an hour, or \$3 a day, were not above the range of wages that people like deceased are able to earn. The result reached is apparently fair and reasonable.

Finally appellant contends that deceased had not "contributed within five years previous to the time of his death" to the support of his father, and therefore appellee was not entitled to recover anything under clause a of section 4, but could only recover under clause c for burial expenses an amount not exceeding \$150. Appellant contends that the words in clause a "to whose support," etc., qualify not only the preceding words "lineal heirs," but also the preceding word "parents," and he says they also qualify the words "widow, child and children," therefore that no party answering to any of those descriptions is entitled to anything under that statute unless there is proof that deceased had contributed to the support of such person within five years previous to his death. Appellee answers this contention by saying that there is proof that deceased contributed to the support of his father within that period of five years, and he also insists that the words "to whose support he had contributed," etc., only qualify the words "lineal heirs," and says it is absurd to suppose that the Legislature

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intended that the widow or children should not be entitled to recover without proving that deceased had contributed to their support within five years, and calls our attention to decisions of the Supreme Court under the Injuries Act (J. & A. ¶ 5449), and particularly to *Dukeman v. Cleveland, C., C. & St. L. Ry. Co.*, 237 Ill. 104, holding that the law presumes some substantial damage from the relationship alone in case of wife, child or parents of deceased, and says that the law was enacted in favor of those dependent upon the deceased; that the Legislature knew the construction of the former law in relation to the presumption of dependency of parents, and therefore must have intended the qualifying words to apply only to the immediately preceding words, "lineal heirs." If there were a comma after the word "parents" the meaning contended for by appellee would quite likely be gathered from a first reading of the clause, but no comma is there found and we do not see that the fact that a comma is found after the word "parents" in clause (1) of section 5 (J. & A. ¶ 5453) before quoted, helps appellee's contention. While punctuation does not control, it is helpful in construing statutes. Appellant while admitting and arguing that these provisions were enacted for the benefit of dependents and that dependency must be proven as a basis of recovery, says that the statute must be literally construed and a recovery permitted only when some provision of the statute authorizing the recovery can be found; that it is an entire change from the theory of the recovery under the Injuries Act under which we are required to look forward and indulge in presumptions of what the deceased might have done for his dependent relatives in the future had he lived; that here we must look backward, and if he has not contributed to the support of any relative within five years immediately preceding his injury, it is immaterial what prospects there might be that he would have contributed had he lived, and

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there can be no recovery. However reasonable the construction placed on that clause by appellee may be, we doubt whether it can be properly so read. But we do not regard it necessary to determine that question in this case. Assuming that the right of recovery must rest on some proof that deceased contributed to the support of his father within a period of five years before his death, we think the record furnishes such proof. We think without doing violence to language as commonly spoken and understood, that a son living with his parents and paying the price for his board and lodging that is ordinarily paid at boarding houses may be said to be contributing to their support. Instances are very numerous where the parents, or the mother if she survive the father, are living in comfort relying entirely on what the children pay for their board and lodgings at the home. The home is in that way kept up and supported. In most such cases the parents have neither the inclination nor ability to keep a boarding house and in that way provide the support that their children so give them. We therefore hold that in this case the deceased was contributing to the support of his father within the five-year period, and that for that reason, even on appellant's construction of the statute, the recovery was warranted. It also appears from the evidence that the price of \$5 a week that he had paid for his board was not based on the calculation of how much that board was actually worth, but rather on the consideration of the parents' necessities. As we have before said, the father was an old man with no means and small earning capacity. We are of the opinion that the judgment may well rest on appellant's construction of the statute.

It is not argued that the judgment is excessive except for the reasons that we have above considered and discussed. There is some objection made that the court permitted proof of the careful habits of deceased because there was no eyewitness to the accident, and

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it is claimed that there was evidence other than that of eyewitnesses as to how the accident occurred, therefore such proof of deceased's habits was not competent. This question of admission of proof is of little importance because the hearing was before the court without a jury. The inquiry is whether the court should have considered such evidence in arriving at his conclusion. We are of the opinion that the evidence was competent, though perhaps not very material, and could have been properly considered by the court. Finding no error in the record the judgment is affirmed.

*Affirmed.*

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**Burton A. Hitchcock, Executor, Appellee, v. Board of Home Missions et al., Appellants.**

**Gen. No. 6,111. (Not to be reported in full.)**

Appeal from the Circuit Court of Peoria county; the Hon. THEODORE N. GREEN, Judge, Presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.

**Statement of the Case.**

Action by Burton A. Hitchcock, executor, plaintiff, against the Board of Home Missions, and the Troy Orphan Asylum, defendant, in the Circuit Court of Peoria county.

This case has been before this court before (*Hitchcock v. Board of Home Missions*, 175 Ill. App. 87) and before the Supreme Court on appeal from this court (*Hitchcock v. Board of Home Missions*, 259 Ill. 288). The Circuit Court had refused to allow solicitor's fees to the Troy Orphan Asylum, appellant here. This court held that it had erred in so doing, and the Supreme Court affirmed that part of the decision of

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Hitchcock v. Board of Home Missions et al., 196 Ill. App. 358.

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the court and remanded the cause with directions "to allow the Troy Orphan Asylum a reasonable solicitor's fee."

After the cause was redocketed in the Circuit Court, proceedings were had before a master in chancery who refused to hear evidence or consider the value of attorney's services rendered to the Troy Orphan Asylum, either in the appeal to the Supreme Court or to this court, and reported the sum of \$1,000 as a reasonable fee for the services rendered prior to the original decree in the Circuit Court. On objection and exception by defendant Troy Orphan Asylum to that part of the master's report which refused to consider the value of services rendered on the two appeals, the chancellor sustained the report.

From a decree allowing defendant Troy Orphan Asylum an attorney's fee of \$1,000 for services rendered prior to the original decree in the Circuit Court and denying such fees for services rendered on appeal, defendant Troy Orphan Asylum appeals.

LUTHER C. HINKLE, for appellants.

No appearance for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

### Abstract of the Decision.

**COSTS, § 75\***—*when attorney's fees for services rendered on appeal properly denied by trial court upon remanding of cause.* Where the Supreme Court reversed a decree in an action with mandate to allow a party "a reasonable solicitor's fee," the decree of the trial court sustaining a master's report refusing to consider the value of services rendered on appeal, and allowing only a reasonable fee for services rendered prior to the decree originally appealed from, held not erroneous where nothing in the pleadings raised the question of the allowance of such fees for services rendered on appeal, for the reason that without such pleading such question could not be and was not decided in the decree appealed from by this appeal.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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DeWolfe v. Pierce et al., 196 Ill. App. 360.

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**Charles H. DeWolfe, Appellee, v. Harlan W. Pierce et al., Appellants.**

**Gen. No. 6,114. (Not to be reported in full.)**

Appeal from the Circuit Court of Stark county; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.

**Statement of the Case.**

Action by Charles H. DeWolfe, plaintiff, against Harlan W. Pierce *et al.*, defendants, in the Circuit Court of Stark county, to recover for personal injuries sustained by falling through a hole in the floor of defendants' store building. From a judgment for plaintiff for two hundred and fifty dollars, defendants appeal.

It appeared that defendants were conducting a hardware store and tin shop in the City of Toulon in a building (or two adjoining buildings) having two entrances from the street. One entrance was to the general store room where smaller articles were kept. That room was kept heated and was the usual place for customers to enter. The other was to a room that defendants call a warehouse, but in which was kept for sale stoves and heavier articles. This room was not kept heated, and the entrance was by means of a sliding door. Back of this room was a tin shop where one of the brothers worked. There was a door from each of the rooms into this tin shop. Before the time in question defendant's customers, desiring to purchase some of the larger articles, or having business in the tin shop, sometimes used the doorway into the so-called warehouse.

A short time before the accident a drayman in unloading a stove had broken a hole in the floor just back of this sliding door, and defendants had placed a stove over the broken board so that customers entering in

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that way would not fall in the opening made. On the day of the accident the stove was removed and one of the defendants was engaged in repairing the floor. He had removed the stove and gone out of the room for a short time to get something needed in the repair, leaving the sliding door partly open, and while he was gone plaintiff, entering the store, stepped in the hole, receiving a quite serious injury. The defense was that plaintiff was a licensee on defendant's premises when injured.

**J. H. RENNICK** and **T. W. HOOPES**, for appellants.

**JAMES H. ANDREWS** and **CHARLES W. ESPEY**, for appellee.

**MR. JUSTICE CARNES** delivered the opinion of the court.

### **Abstract of the Decision.**

1. **NEGLIGENCE, § 181\***—*when no variance as to place where injury sustained.* In an action to recover for personal injuries where the declaration alleged that plaintiff's injuries were sustained by falling through a hole in defendants' "store building," and the evidence showed that the hole in question was in the floor of a warehouse used in connection with defendants' store, *held* no variance, the warehouse under the evidence being properly denominated a store building.

2. **NEGLIGENCE, § 24\***—*when owner not liable for injuries to person entering premises by permission only.* One entering premises by permission only, without enticement, allurement or inducement held out by the owner or occupant, cannot recover for injuries caused by obstructions or pitfalls existing in the premises.

3. **NEGLIGENCE, § 23\***—*when person entering premises not mere licensee without invitation.* In an action to recover for personal injuries sustained as a result of defendants' alleged negligence by falling through a hole in the floor of an entrance to a building where defendants conducted a tin and hardware business, it appearing that the entrance in question through which plaintiff sought to enter such store was not the entrance provided for the purpose, *held* that plaintiff was not a mere licensee without invitation so as

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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to excuse defendants from the duty of exercising care to keep such entrance free from danger where it appeared that the entrance in question was so used by customers entering the store with sufficient frequency to charge defendants with knowledge that it was being so used, in which case an invitation so to use that entrance is to be implied.

4. NEGLIGENCE, § 205\*—*when instruction ignoring issue not prejudicially erroneous.* In an action to recover for personal injuries sustained as a result of defendants' alleged negligence by falling through a hole in the floor of an entrance to a building wherein defendants conducted a tin and hardware business, where the defense was that at the time of the injury plaintiff was a mere licensee without invitation, an instruction ignoring the question whether plaintiff at such time was an invitee of a licensee *held* not prejudicially erroneous, where a further instruction told the jury that plaintiff could not recover unless the evidence showed that the building in question was a store building into which the public was invited to enter, and where the proof was clear and convincing, and where the instructions, as a whole, were as favorable to defendants as they had a right to ask.

5. NEGLIGENCE, § 198\*—*when question whether plaintiff exercised due care for jury.* In an action to recover for personal injuries alleged to have been sustained by reason of defendants' negligence, the question whether at the time of the injury plaintiff was in the exercise of due care for his own safety is for the jury.

6. NEGLIGENCE, § 188\*—*when evidence sufficient to sustain finding as to exercise of due care by plaintiff.* In an action to recover for personal injuries sustained by falling through a hole in the floor of an entrance to a building wherein defendants conducted a tin and hardware business, which defect in such floor was alleged to be due to defendants' negligence, evidence *held* to justify the jury in finding that at the time of the injury plaintiff was in the exercise of due care for his own safety.

7. DAMAGES, § 115\*—*when verdict for personal injuries not excessive.* In an action to recover for personal injuries sustained as a result of defendants' alleged negligence by falling through a hole in the floor of an entrance to a building wherein defendants conducted a tin and hardware business, where plaintiff in his testimony sought to magnify the injuries sustained by him as a result of the accident, a verdict of two hundred and fifty dollars for plaintiff *held* not excessive.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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**H. A. Hillmer Company and Henry A. Hillmer, Appellants, v. Martha Behr, Appellee.****Gen. No. 6,117.**

1. **APPEAL AND ERROR, § 726\***—*when decree must be supported by evidence in record.* Where a decree finds no facts to support it, such decree must be supported on appeal by evidence found in the record, if supportable at all.

2. **INJUNCTION, § 311\***—*when solicitor's fees may be recovered upon dissolution of temporary injunction.* On a suggestion of damages after the dissolution of a temporary injunction, a defendant may recover solicitor's fees which such defendant has paid or for the payment of which he has become obligated, in so far as such services were rendered in obtaining such dissolution, but not including services rendered in the general defense of the suit.

3. **INJUNCTION, § 320\***—*when evidence insufficient as basis for awarding attorney's fees for procuring dissolution of temporary injunction.* Where on a suggestion of damages after the dissolution of a temporary injunction solicitor's fees are sought to be assessed as an element of such damages, and where the evidence makes no distinction between services rendered as strictly necessary to procure such dissolution and those rendered in the case generally, there is no evidence on which the value of the services directed solely to the object of obtaining such dissolution can be determined.

4. **INJUNCTION, § 154\***—*what is office of injunction pendente lite.* An injunction *pendente lite* is a mere ancillary writ whose only office is to preserve the *status in quo* pending a final hearing, and for which writ a complainant may apply or not as he sees fit.

5. **INJUNCTION, § 239\***—*when one may do acts sought to be restrained by permanent writ with impunity.* A defendant in a bill praying for a perpetual injunction against whom no injunction *pendente lite* has been sued out may, during the pendency of the suit, do the acts sought to be restrained thereby without being in contempt of the writ, but he so acts at the risk of having his acts done *pendente lite* declared illegal, and of being compelled to restore everything to its condition at the commencement of the suit.

6. **INJUNCTION, § 311\***—*what are separable items in computing attorney's fees as damages upon dissolution of injunction pendente lite.* On a suggestion of damages after the dissolution of an injunction *pendente lite*, where it is sought to have solicitor's fees assessed as an element of such damages, the services rendered for the mere

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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purpose of getting rid of such an injunction are clearly distinguishable from services rendered in the general defense of the suit.

7. **INJUNCTION, § 320\***—*when evidence insufficient to authorize assessment of attorney's fees as damages upon dissolution of temporary injunction.* On a suggestion of damages after the dissolution of a temporary injunction, where it is sought to have solicitor's fees assessed as an element of such damages, and the evidence makes no discrimination between services rendered as strictly necessary to procure a dissolution of the injunction and those rendered in the case generally, an assessment of such fees as damages cannot be sustained on evidence that a certain sum was paid on a motion to dissolve and upon a final hearing together.

8. **INJUNCTION, § 308\***—*when attorney's fees for depending suit not assessable as damages upon dissolution of temporary injunction.* Where a temporary injunction is sued out as ancillary to the principal relief sought, fees for defending the suit generally cannot be assessed as damages on the dissolution of the injunction.

9. **INJUNCTION, § 308\***—*when reasonable attorney's fees allowed as damages upon dissolution of temporary injunction.* On a suggestion of damages after the dissolution of temporary injunction, a reasonable solicitor's fee may be allowed as damages notwithstanding the fact that a demurrer was interposed to the bill or that the knowledge gained on hearing of a motion to dissolve was subsequently used at the hearing on the merits.

10. **INJUNCTION, § 308\***—*what solicitor's fees allowed as damages upon dissolution of temporary injunction may cover.* The damages allowed by the statute on a suggestion of damages after the dissolution of a temporary injunction are only those sustained by an improper and wrongful suing out of the injunction, so that any solicitor's fees allowed can only extend to those paid for services on the motion to dissolve.

11. **INJUNCTION, § 391\***—*when decree assessing solicitor's fees as damages or dissolution of temporary injunction reversed.* A decree assessing solicitor's fees and expenses as damages on the dissolution of a temporary injunction must be reversed where no attempt is made either in the evidence or in the argument of counsel to distinguish between the items of services and expenses, and where it appears that the injunction in question was only dissolved by a final decree dismissing the bill, no motion for such dissolution being made prior to the final decree.

12. **APPEAL AND ERROR, § 1269\***—*when not presumed trial court acted on evidence not in record.* On appeal from a decree, the Appellate Court cannot presume that in making such decree the trial

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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court acted on evidence not shown in a record which purports to be a full copy of all the evidence introduced.

Appeal from the Circuit Court of Stephenson county; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the April term, 1915. Reversed. Opinion filed October 20, 1915.

CHARLES H. GREEN, for appellants.

R. R. TIFFANY, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

This is an appeal from a decree awarding damages for wrongfully suing out an injunction. There had been a temporary injunction granted and no motion to dissolve the same, but the bill was dismissed on a hearing on the evidence and that decree of the court sustained on appeal to the Supreme Court in *H. A. Hillmer Co. v. Behr*, 264 Ill. 568. It was a controversy between the parties involving the question whether a piece of land upon which appellee was about to build, and from which building she was temporarily enjoined, was a public street, and it was held that it was not. The facts and questions involved can be learned from a reading of the opinion in that case. Counsel for both sides argue from the statement of the case there made. The trial court had continued the injunction in force pending the appeal, and reserved for future consideration the question of damages for wrongfully suing out the same, which reservation the Supreme Court held was proper practice, but did not have the question before it whether any damages could be properly assessed and therefore cannot be said to have considered or passed on that question.

The suggestion of damages on which the present hearing took place consisted of different items, including items of solicitor's fees and solicitor's expenses in the Circuit and Supreme Court of \$390.50, which the court allowed, and a large item for rent of the premises which the court disallowed, it is said by ap-

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pellee, because of the wrongful use which he held the evidence showed she was to make of the premises. No cross-error is assigned, and the only question presented here is whether the court erred in allowing the items of solicitor's fees and expenses. There is no finding of facts in the decree, and it must be sustained, if at all, on the evidence found in the record. There is no attempt in the proof to distinguish between services rendered in obtaining a dissolution of the injunction (if such services can be said to be rendered where there is no motion to dissolve the temporary injunction) and services rendered in the general defense of the suit, and appellants contend that for that reason the decree should be reversed. The law is clearly announced in *Lambert v. Alcorn*, 144 Ill. 313, where the court said, citing authorities, that a defendant might recover solicitor's fees which he had paid or become obligated to pay, for services rendered in obtaining a dissolution of the injunction, but not those rendered in the general defense of the suit, and the court found from the record before it that the principal part of the services rendered for which a recovery was sought were in the general defense of the suit, and particularly upon the final hearing, and said: "The evidence wholly fails to distinguish between the services rendered in relation to the motion to dissolve, and those rendered in the general defense of the suit, and there is nothing, so far as we are able to see, from which the value of the services directed solely to the object of obtaining a dissolution of the preliminary injunction can be determined."

And held for that reason there could be no recovery, and also said: "Perhaps the view was entertained by court and counsel at the time of the assessment of damages, that as the only relief sought by the bill was an injunction, the entire defense was virtually directed to the sole object of procuring a dissolution of the injunction, and therefore that all the services

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rendered in the case must be deemed to have been rendered for that purpose. The relief sought by the bill was a perpetual injunction restraining the defendant from laying his proposed tile drain, and an injunction *pendente lite* was a mere ancillary writ which the complainant was at liberty to apply for or not as he saw fit. Its only office was to preserve the *statu quo* until a final hearing could be had. The complainants might have prosecuted their suit without asking for a preliminary injunction, and if the defendant had proceeded to construct his drains during the pendency of the suit, he would not have been in contempt for disobedience to a writ it is true, but he would have acted at the risk of having his acts *pendente lite* declared illegal, and of being compelled to restore everything to the condition in which it was at the commencement of the suit. In a litigation of this character, the services rendered in the general defense of the suit are as clearly distinguishable from those rendered for the mere purpose of getting rid of an injunction *pendente lite*, in case one has been issued, as they are in cases where relief of a different character is sought." In that case a motion was made to dissolve the preliminary injunction and partly heard, but never decided. In the present case there was no motion to dissolve the temporary injunction. A similar question was before this court in *Kotz v. Glos*, 53 Ill. App. 485, where, as here, there was no motion to dissolve the preliminary injunction, the case of *Lambert v. Alcorn*, *supra*, and other earlier cases were discussed and attention called to the language of the court in *Elder v. Sabin*, 66 Ill. 126, where it is said: "The statute only allows the assessment of damages sustained by reason of improperly suing out the injunction, and the damages must be confined alone to that ground. The charge for lawyer's fees could only extend to the motion to dissolve the injunction."

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The court held in *Landis v. Wolf*, 206 Ill. 392, that where the evidence makes no discrimination between services rendered in the case generally and services which were strictly necessary to procure a dissolution of the injunction there is no evidence upon which the assessment of damages can be based, and an allowance in such case cannot be sustained on proof that a certain sum was paid upon a motion to dissolve and upon a final hearing together. In *Milligan v. Nelson*, 188 Ill. 139, the court reviewed the authorities and held that where the services sought to be recovered for are rendered in securing a dismissal of the bill on final hearing, there can be no recovery on a suggestion of damages. In *Dempster v. Lansingh*, 234 Ill. 381, there was a temporary injunction and hearing on motion to dissolve and an allowance of solicitor's fees as damages, and in reviewing the case on the question of that allowance the court said: "The law is, that where the injunction is ancillary to the principal relief sought, fees for defending the suit generally should not be assessed as damages upon the dissolution of the injunction."

In *City of Princeton v. Gustavson*, 241 Ill. 566, a bill for injunction was dismissed on hearing and the defendant was allowed \$300 as damages to reimburse him for solicitor's fees "which he had expended or agreed to pay in procuring a dissolution of the injunction." It does not appear whether there was a motion to dissolve the temporary injunction, but we assume there was and some liability for solicitor's fees in that matter, for the court held, without much discussion of that feature of the case, that the allowance was supported by the testimony, and affirmed the decree, citing *Lambert v. Alcorn*, *supra*, and *Dempster v. Lansingh*, *supra*, in support of its decision, which, of course, means that it did not intend to overrule or qualify anything said in those cases. Appellee's counsel in support of the actions of the court cites *Marks*



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*v. Columbia Yacht Club*, 219 Ill. 417, holding that a reasonable solicitor's fee for services in procuring the dissolution of the injunction may be allowed as damages notwithstanding the fact that a demurrer was interposed or that the knowledge gained on a hearing of a motion to dissolve was subsequently used upon the trial of the case on its merits; but in that case it is said on page 420 of the opinion: "The damages allowed by the statute are only those sustained by reason of an improper and wrongful suing out of the injunction, and the solicitors' fees can only extend to the motion to dissolve."

As we have before said, the allowance of damages was based on the items of solicitor's fees and solicitor's expenses. There is no effort in the argument of counsel to distinguish between the items of solicitor's services and solicitor's expenses, and they are naturally covered by the same suggestions as to proof and the purpose for which they were incurred. As there was no motion to dissolve in this case and no services rendered in an attempt to get rid of the preliminary injunction that under the authorities cited seem a basis for the recovery of damages, the decree must be reversed. Appellants' counsel says that the court had before it the abstract of the record on the appeal, and may have reached his conclusions in part from that. This appellee's counsel denies. We cannot presume that the court acted from evidence not shown by the record here which purports to be a full copy of all the evidence introduced. Presuming that the opinion of the Supreme Court in this case contains a full statement of its history so far as it is necessary to consider that history here outside of what is shown by the record filed here (and counsel for both sides seem to argue the case on that theory), we are of the opinion that there can be no recovery on account of any payment or liability incurred for solicitor's fees and expenses on a suggestion of damages for wrongfully

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suing out the injunction, therefore the cause is not remanded.

*Reversed.*

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**H. C. Williams, Appellee, v. American Insurance Company, Appellant.**

**Gen. No. 6,120.**

1. **INSURANCE, § 668\***—*when evidence sufficient to sustain finding that horse was killed by lightning.* In an action to recover for the loss of a horse under a policy of insurance insuring plaintiff against loss as to his farm horses by reason of lightning, where the horse was alleged to have been struck by lightning while running in a pasture and so damaged that plaintiff was compelled to kill it, and where the evidence tending to prove that the horse was injured by lightning was circumstantial, evidence *held* to warrant the jury in finding that the injury was the result of lightning, such injuries being usually, if not necessarily, proven by circumstantial evidence.

2. **INSURANCE, § 342\***—*when stipulations in policy requiring written waiver of proofs of loss as prerequisite to action may be waived.* Stipulations in an insurance policy making it a prerequisite to a recovery thereon that insured shall furnish proofs of loss as required in such policy may be waived by insurer, and such waiver need not be in writing although such policy provides that such condition shall not be waived unless the waiver be in writing, such condition being one which may be waived like other conditions in the policy.

3. **INSURANCE, § 321\***—*when stipulation in policy requiring proofs of loss as prerequisite to action waived.* In an action to recover for the loss of a horse under a policy of insurance insuring plaintiff against loss as to his farm horses by reason of lightning, where the horse was alleged to have been struck by lightning while running in a pasture and so damaged that plaintiff was compelled to kill it, a provision in the policy requiring plaintiff as a prerequisite to recovery thereunder within sixty days of a loss under the policy to furnish to insurer proofs of such loss, *held* waived where it appeared that shortly after the accident an agent of insurer called on plaintiff to adjust the loss and filled out a form of proof of loss which plaintiff executed, and in which he incorrectly stated that the horse "was struck by lightning," it also appearing by uncon-

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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tradicted evidence that such agent took the paper away with him after being informed by plaintiff of the actual fact as to the cause of the death of the horse, such information being given either before signing such proof of loss or so immediately thereafter as to be part of the same transaction.

4. **INSURANCE, § 472\***—*when failure of insured to demand arbitration of amount of loss not condition precedent to maintenance of action.* In an action to recover on a policy of insurance which provided that in case of difference arising in case of loss or damage such difference should be arbitrated, but that such arbitration should be binding "as to the amount of loss only," where insurer did not demand an arbitration, and where there was no controversy as to the amount of loss, the failure of insured to make such demand *held* immaterial, such arbitration being not made by the policy a condition precedent to the right of recovery thereunder.

5. **EVIDENCE, § 399\***—*when expert may not state ultimate fact.* An expert witness must not take the place of the jury and declare his belief as to the ultimate fact to be determined by them.

6. **EVIDENCE, § 399\***—*what facts witness may not express opinion upon.* A witness cannot give his opinion upon the fact which the jury are to determine.

7. **APPEAL AND ERROR, § 1492\***—*when exclusion of expert testimony not substantial error as unduly restricting rights thereto.* In an action to recover for the loss of a horse under a policy of insurance insuring plaintiff against loss as to his farm horses by reason of lightning, where the horse was alleged to have been struck by lightning while running in a pasture, the horse's leg being broken and it being so damaged that plaintiff was compelled to kill it, the exclusion of the testimony of an insurance adjuster and two veterinary surgeons offered as expert witnesses by defendant as to whether such horse was struck by lightning, *held* not substantial error as unduly restricting defendant in the introduction of expert testimony where it appeared that such witnesses were permitted to testify as to the effect of a stroke of lightning on an animal, and that such a stroke would not be likely to break a bone without killing the animal, as well as to other facts supposedly within the special knowledge of such witnesses.

8. **EVIDENCE, § 399\***—*what matters expert witnesses may not state conclusions in.* Expert witnesses are not permitted to state their conclusions in matters of common observation in which the lay mind is capable of forming a correct conclusion.

9. **EVIDENCE, § 399\***—*when veterinary surgeon may not express opinion as to how horse broke leg.* There is nothing in the education of a veterinary surgeon which would enable him, as an expert

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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witness, to enlighten the lay minds of the jury on the question as to how a horse might get his leg broken while running in a pasture.

10. **INSURANCE, § 397a\***—*when insurer liable for loss of horse killed by owner because disabled by lightning.* In an action to recover for the loss of a horse under a policy of insurance insuring plaintiff against loss as to his farm horses as a result of lightning, where the horse was alleged to have been struck by lightning while running in a pasture, so damaging the horse that plaintiff was compelled to kill it, it is immaterial whether the horse was killed by the lightning or by plaintiff as a result of being injured by the lightning, since the recovery is based on the injury and not on the killing.

11. **INSURANCE, § 669\***—*what evidence sufficient to establish lack of value of horse after injury by lightning.* In an action to recover for the loss of a large farm gelding used as a draft horse, under a policy insuring plaintiff against loss as to his farm horses by lightning, where the horse was alleged to have been struck by lightning while running in a pasture and so damaged that plaintiff was compelled to kill it, only slight evidence will be required to prove that the horse was of no value after the injury where there is direct evidence that it was worth but \$125 before such injury.

12. **INSURANCE, § 447\***—*when incorrect statement in proof of loss of horse by lightning does not bar recovery.* In an action to recover for the loss of a horse under a policy of insurance insuring plaintiff against loss as to his farm horses as a result of lightning, where the horse was alleged to have been struck by lightning while running in a pasture and so damaged that plaintiff had to kill it, and where the policy provided that attempted fraud or false swearing by plaintiff, either in the proof of loss or otherwise, should forfeit all claim under the policy, a written statement sworn to by plaintiff and intended as a proof of loss, wherein plaintiff incorrectly stated that the horse "was killed by lightning," held not available to defendant as a bar to recovery where it appeared by uncontradicted evidence that the statement in question was prepared by defendant's agent and taken away by him with full knowledge that such statement was not strictly true, plaintiff having so informed such agent either before signing or so immediately thereafter as to be part of the same transaction, it thereby appearing that plaintiff had no intention of deceiving defendant.

13. **INSURANCE, § 694\***—*when instruction as to proofs of loss not substantially harmful in ignoring issues.* In an action to recover for the loss of a horse on a policy of insurance insuring plaintiff against loss as to his farm horses as a result of lightning, which action involved the question of defendant's waiver of a provision in

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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such policy requiring proofs of loss to be furnished as a prerequisite to a recovery, and the further question of plaintiff's alleged fraudulent misstatements in a paper intended to be a proof of loss in compliance with the requirements of the policy, an instruction that as a prerequisite to a recovery in the action the jury must find that plaintiff complied with the conditions of the policy, *held* not substantially harmful to defendant in that it ignored the question of waiver and fraud or in that it told the jury without qualification that plaintiff could recover regardless of waiver, since if such instruction was so construable the evidence was clear that there was a waiver of such proof of loss.

14. **INSURANCE, § 639\***—*when evidence of agent admissible without proving authority.* In an action to recover on an insurance policy, evidence of the statement of an agent made to plaintiff that insurer would not pay the loss is competent without proof of the authority of such agent to speak for the company, where it appears that the policy sued on was negotiated by such agent and was by him delivered to plaintiff, in which case such agent must be held to have authority to communicate to plaintiff the fact that insured would not voluntarily pay the loss.

Appeal from the Circuit Court of Mercer county; the HON. FRANK D. RAMSAY, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.

SEARLE & MARSHALL, for appellant.

GRAHAM & CARLSTROM, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

H. C. Williams, the appellee, held a policy issued by the American Insurance Company, the appellant, insuring him among other things "against all such immediate loss or damage as may occur by lightning" to horses owned by him. One Seaton, an agent of appellant, took the application and delivered the policy. On the night of October 4, 1913, there was a severe thunder storm and the next morning a large work horse belonging to appellee was found in his forty-acre pasture field with its hind leg broken just above the hock. The bone seemed to be splintered and a small sliver stuck through the flesh on the inside of the leg. There

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were dark streaks on the leg that looked as though it had been burned. The hind parts of the horse seemed to be paralyzed and he could not get up. There was a hole in the ground ten or twelve inches deep, and a foot or more in diameter that seemed to have been recently made by some explosive force and indications that the horse had fallen near that hole and dragged itself a few yards down an incline to the place where he was found. He had been seen in the pasture the evening before in good condition, and there were no other marks upon the horse or the ground, and no other circumstances tending to show the cause of the injury. Several persons were called by appellee to see the horse, and then concluding that the injuries rendered him valueless, he was killed. Appellant was in some way notified of the occurrence and within a few days its agent, Hubble, appeared to adjust the loss. He filled out a proof of loss which included the statement that the horse "was killed by lightning," and appellee signed and swore to the statement; but when that statement was made appellee told the agent Hubble that the horse was not killed but that his leg was broken and they shot him. Appellee says he told him this before signing the paper, and Hubble says he told it after signing the paper, but they agreed that it was a part of the same transaction in which the paper was signed. Hubble left, taking the paper with him, and afterwards the agent, Seaton, told appellee that the company would not pay the loss. Whereupon this suit was begun before a justice of the peace, where appellee had judgment for \$125. It was tried on appeal in the Circuit Court and there appellee had a verdict and judgment for \$125. The insurance company brings the case here for review and argues that the proof does not sustain the necessary finding included in the verdict that the immediate loss or damage occurred by lightning; that the evidence was circumstantial and that under the law the burden was on appellee to prove

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that the horse was struck by lightning and so injured that it was necessary to kill him, and that if the injury was occasioned in any other manner or could be accounted for under the evidence in any manner other than being caused by lightning on the night in question, then the plaintiff could not recover. The court at appellant's instance so instructed the jury, and we are of the opinion, even assuming that to be the law applicable to circumstantial evidence, that the facts as above stated warranted the jury in finding that the injury was caused by lightning. Injuries of this kind must usually, if not always, be proven by circumstantial evidence.

Appellant argues that recovery was precluded by failure of appellee to furnish proofs of loss, as required by the terms of the policy. That such requirement may be waived by the insurance company has long been settled law in this State, and it may be waived, not in writing, notwithstanding the policy contains the provision that it shall not be waived unless in writing. The stipulation in a policy that there shall be no waiver unless in writing is itself a condition that can be waived like other stipulations in the policy. *Phenix Ins. Co. v. Grove*, 215 Ill. 299, and authorities there cited. We entertain no doubt that under the facts above stated proof of loss was waived by appellant. It is argued that appellee cannot maintain this action because there was a provision in the policy that in case of difference arising in case of loss or damage such difference should be submitted to arbitration, which arbitration should be binding "as to the amount of loss only." There is no controversy about the amount of loss. The evidence is uncontradicted that the market value of the horse was \$125. No arbitration was demanded by appellant, and we are of the opinion that the failure of appellee to demand an arbitration is not material under the facts of this case. (*Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329.)



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Defendant offered the testimony of its agent, Hubble, an experienced adjuster of such claim, and two veterinary surgeons to enlighten the jury to the effect of a stroke of lightning upon an animal. Several questions were asked these witnesses, calling for their opinion whether the horse in question was struck by lightning. The court properly sustained objections to these questions. "An expert must not take the place of a jury and declare his belief as to the ultimate fact." *Keefe v. Armour & Co.*, 258 Ill. 28, and authorities there cited. "The rule is, that a witness cannot be permitted to give his opinion on the very fact which the jury is to determine." *Schlauder v. Chicago & S. Traction Co.*, 253 Ill. 154. The witnesses were permitted to testify to the effect on an animal of a stroke of lightning, and that it was unlikely that it would break a bone without killing the animal, and various other facts that might be supposed to be within their special knowledge. We find no substantial error of the court in excluding expert testimony offered by appellant. The court seems to have kept within the rule indicated in *Illinois Cent. R. Co. v. Smith*, 208 Ill. 608. Experts are not permitted to state their conclusions in matters of common observation in which the lay mind is capable of forming a correct judgment. Some of these witnesses in this case were asked, in substance, to express an opinion how a horse might have got his leg broken running in a pasture, and the court sustained objections to those questions. It is not clear how the education of a veterinary would enable him to enlighten the lay mind on that subject. But be that as it may, we are satisfied that appellant was not unduly restricted in the introduction of expert testimony.

Appellant places much stress on the fact that the horse was not killed by lightning, but was killed by appellee. We see no force in this contention. The recovery is based not on the killing but on the injury. There is direct testimony that the animal was ren-

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dered valueless by the broken leg, and slight testimony should suffice to support the proposition that a big farm gelding only worth \$125 before his leg is broken is of no value after his leg is broken.

There is a clause in the policy providing that any attempted fraud or false swearing on the part of the assured in the proof of loss, or otherwise, shall forfeit his claim, and appellant urges that the sworn statement of appellee that the horse was killed by lightning precludes his recovery. There is no merit in this contention. The record shows that as a part of the same transaction the paper in question was prepared by appellant's agent and signed by appellee, and taken by appellant's agent and carried away with full knowledge that the statement that he had asked appellee to sign was not strictly true. This is uncontradicted, and it is very apparent that appellee did not wish to mislead the company but was only desiring to sign such a statement as it required as a condition precedent to paying the loss. Appellant cannot under these facts set up this written statement as a bar to recovery.

It is said that the court ignored this question of fraud and waiver in giving an instruction for the plaintiff; but the jury in the instruction complained of were told they must find that the plaintiff after the injury complied with the conditions of his policy of insurance requisite to his recovery for such loss. We do not think this instruction should be construed as telling the jury without qualification that the plaintiff was entitled to recover regardless of the question of waiver, and if it should be so construed the evidence is so clear on the question of waiver that no substantial harm could have resulted to appellant.

It is also objected that the court erred in permitting evidence of the statement of appellant's agent, Seaton, before referred to, that the company would not pay the loss, on the ground that there was no proof that Seaton was authorized to speak for the company. He had

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acted for the company in soliciting the insurance contract, and had, as the company's agent, delivered the policy to appellee, and we think he may well be held to possess the authority to communicate to appellee what certainly was the fact that the company would not voluntarily pay the loss. Finding no reversible error in the record the judgment is affirmed.

*Affirmed.*

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**In re Estate of Hortense S. Teeple, Deceased.  
Lovina L. Dunlap, Administratrix, Appellant, v. John  
H. Savage, Appellee.**

**Gen. No. 6,131.**

1. EVIDENCE, § 461\*—*what weight given to testimony of judge as to nonjudicial acts.* Directions and advice given by a probate judge to the parties to a controversy not before him while acting as a court, and in which he makes no orders of record embodying such directions, are only material as an incidental part of the evidence in a case involving the subject-matter of the controversy in regard to which such directions and advice were given.

2. EXECUTORS AND ADMINISTRATORS, § 147\*—*when administrator not in legal possession of securities.* A person about to be appointed public administrator of the estate of an intestate who consents to receive manual possession of securities formerly belonging to his intestate, under an agreement to return the same on demand to one claiming title by reason of a gift from intestate in her lifetime, is not in legal possession of such securities as such administrator although he retains such possession after being appointed such.

3. EVIDENCE, § 35\*—*when title presumed from possession of personalty.* Possession of personal property is prima facie evidence of title thereto.

4. WORDS AND PHRASES—*personal property.* The term "personal property" applies to notes and money as well as to goods and chattels.

5. DEEDS, § 176\*—*when presumption of delivery of deed in lifetime of grantor.* A deed produced by a grantee after the death of the grantor is presumed to have been delivered in the lifetime of

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\*See Illinois Notes-Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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such grantor although the parties thereto were members of the grantor's family during his lifetime.

6. EVIDENCE, § 479\*—*how possession of title in possessor of personal property may be overcome.* The presumption of title in the possessor of personal property may be and often is overcome by evidence explaining such possession.

7. EXECUTORS AND ADMINISTRATORS, § 100\*—*when administrator under no obligation to begin action to determine title to securities.* Where securities are in the possession of one claiming title thereto under an alleged gift by an intestate in her lifetime, and where the presumption of title in such possessor arising from the fact of possession is supported by direct evidence, other than that of the claimant, that such claimant has such title, no duty rests on the administrator of such intestate to begin an action to determine the question of title to such securities.

8. EXECUTORS AND ADMINISTRATORS, § 559\*—*how right to compensation determined.* The fact that an administrator, pending his appointment as such, was appointed administrator to collect, is not material in determining his right to compensation, where his only acts in either capacity were to collect a small amount of assets belonging to intestate, and to litigate the validity of his appointment.

9. APPEAL AND ERROR, § 1200\*—*what questions not considered on appeal from order approving administrator's report.* On appeal from an order approving an administrator's report, the fact that such administrator did not file an inventory of such estate within the time required by law is not material in determining his right to compensation, where the objections heard on review are not based on that ground, and where it does not appear that the estate suffered any loss by reason of such failure.

10. APPEAL AND ERROR, § 1488\*—*when admission of immaterial testimony in trial by court not ground for review.* On appeal from an order entered in an action tried by the court, an appellant cannot complain that immaterial testimony was heard by the court in the absence of prejudicial error.

11. EXECUTORS AND ADMINISTRATORS, § 559\*—*when administrator cannot recover compensation.* Where the assets of an estate have been exhausted in paying the expenses of litigation instituted by those interested therein, an administrator cannot recover compensation for his services, although his efforts to perform his duty are honest and intelligent, and although he has been subjected to much annoyance and trouble from such litigation.

Appeal from the Circuit Court of Will county; the Hon. ARTHUR W. DESELM, Judge, presiding. Heard in this court at the April

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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term, 1915. Affirmed. Opinion filed October 20, 1915. *Certiorari* denied by Supreme Court (making opinion final).

HERMAN WELK, for appellant; FREDERIC C. ELLIS and JESSE WILCOX, of counsel.

JOHN H. SAVAGE, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Hortense S. Teeple died intestate March 23, 1909. The appellee, John H. Savage, then public administrator, was on April 1, 1909, on application of creditors, appointed administrator of her estate by the Probate Court of Will county, and qualified as such, and so acted until July, 1911, when his appointment was revoked and under the direction of this court and appellant, Lovina L. Dunlap, an heir, was appointed administratrix of the estate. The facts concerning and the reasons for the revocation of appellant's letters are found in our opinion in *Savage v. Luther*, 165 Ill. App. 1. Nothing impeaching his integrity or reflecting on his management of the estate was found in the case then before us.

During the period of his administration, litigation about his appointment was constantly pending. He got possession of assets of the estate upon which he realized \$100 only, and he paid out in court costs and other expenses \$124.05, the largest item, \$72.35, being the costs of appeal here, which he was ordered by this court to pay in due course of administration. He made no charge for attorney's fees or commissions. Upon his removal he turned over to his successor the assets in his hands, and made a report asking that he be allowed \$24.05, the sum that he had expended in excess of what he had received from the estate. Objections were filed to this report and heard and overruled in the Probate Court and in the Circuit Court on appeal, and this appeal is from the order of the Circuit Court approving said report.

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Deceased in her lifetime was the owner of three securities mentioned in the arguments as the Evanston bond, \$100, Lynch note, \$500 and Ochs note, \$400, each drawn or indorsed so as to be payable to bearer. Appellant in his statement of his reasons for reversal here says that those securities came to the sight, knowledge and possession of Savage, as such administrator, and that he is chargeable therewith. This is the only question of importance raised here. Three items of expenses aggregating \$26.70 are objected to, but we are of the opinion that they were properly allowed. The facts concerning the three securities are that Mrs. Teeple died at the residence of a friend. Immediately after her death these securities were exhibited to some of the people in the house by Mrs. Isabel Reece, who then had them in her possession. A day or two after the funeral Mrs. Reece took them to the office of Morris Sprague, a lawyer in Joliet, who was acquainted with the deceased and her friends. Mrs. Reece claimed that deceased in her lifetime had given her the securities, and left them with the attorney, taking his written receipt and promise to deliver them to her on demand. He took them to the probate judge, told him of the transaction, and asked what he had better do with them. The judge had appointed, or was about to appoint, appellee administrator, and advised Mr. Sprague to leave them with appellee as a custodian the same as he, Sprague held them, to be delivered to Mrs. Reece on demand. The judge testified on the trial of this case that he so advised the disposition of the papers because he understood Mrs. Reece was liable to be out of his jurisdiction more or less in the future, and he wanted the papers where they could be obtained in case of litigation before him as to their ownership. Appellant says evidence of this interview with the judge, and what he said and thought, is improper and immaterial, which is probably true. But Sprague took the papers to appellee, told him of the

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facts concerning his, Sprague's possession of them above stated, including his conversation with the judge, and appellee took the papers and put them in his vault, consenting to act as custodian under those conditions. About four months after this transaction Mrs. Reece went to Sprague's office, tendered the receipt, and demanded the possession of the papers. They both went to appellee's office and asked him for them. He hesitated as to his duty in the matter, and all three of them went to the courthouse and stated the matter to the probate judge. He directed appellee to return the papers to Sprague, which he did, and Sprague immediately handed them to Mrs. Reece. On neither of these occasions was the judge acting as a court. There was no order entered of record in reference to either of the transactions. Therefore, the advice and direction of the judge is only material here as an incidental part of the story of what was done with these papers, and why it was done.

Nothing further was done by any one interested in the estate in relation to these three securities until after appellant's appointment as administratrix, when she filed in the Probate Court a petition for a citation against Mrs. Reece and others, to compel them to disclose concealed assets of the estate. Mrs. Reece was then in Chicago and was not served with process, but she voluntarily appeared before the Probate Court and testified that these securities were given her in the lifetime of deceased in the presence of witnesses, and produced in court the witnesses to the transaction in the presence of appellant and her attorney, who was conducting the trial. Appellant then moved to dismiss the citation proceeding without prejudice, which motion was denied, but on appeal to the Circuit Court, granted. Mrs. Reece had the two notes in her possession and so stated at the hearing in the citation proceeding in the Probate Court. While it is true that appellee had these securities in his manual possession,



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he did not receive or hold them in his capacity as administrator of the estate, and had no more right to retain them against Mrs. Reece's demand than he would have if they had been placed in his vault, and therefore within his reach, by some third person occupying the vault with him. The question is whether he should be charged with negligence in not beginning some proper proceeding to test the ownership of the securities. He had only \$100 of the estate that he could use in paying expenses. He was kept in constant litigation over his right to administer, which it was his duty to defend, and in which he was successful in the lower courts. Mrs. Reece had possession of these securities after the death of Mrs. Teeple either by herself, or by Sprague, or appellee, as her custodians. That possession was prima facie evidence that she owned them. This proposition of law is denied by appellant, but is elementary and has been repeatedly recognized in this State. *Roberts v. Haskell*, 20 Ill. 59, is among the earlier cases. It was said in *Brownell v. Dixon*, 37 Ill. 197: "The possession of personal property is prima facie evidence of ownership, and the term 'personal property' applies as well to notes and money as to goods and chattels." See also, *Henderson v. Davisson*, 157 Ill. 379. A deed which was produced by a grantee after the grantor's death is presumed to have been delivered in the grantor's lifetime. *Lines v. Willey*, 253 Ill. 440. And that presumption prevails though the parties to the instrument were, in the lifetime of the grantor, members of the same family. *Schroeder v. Smith*, 249 Ill. 575; *Inman v. Swearingen*, 198 Ill. 437. See also, *O'Connor v. Messenger*, 183 Ill. App. 1. This presumption may be, and often is, rebutted and overcome by proof otherwise explaining the fact of possession. But it seems to have developed in this transaction on the trial in the citation proceeding that there was competent direct evidence, other than that of the donee of the securities, in support of

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the presumption that her possession meant ownership. No duty rested on appellee to begin proceedings to settle title to these securities under the circumstances. Woerner's American Law of Administration (2nd Ed.), vol. 2, paragraph 678.

It also appears in this record that appellee, pending his administration before discussed, was appointed by the Probate Court administrator to collect; but that is of no consequence here, because his only acts in question in either capacity are as above set forth. It also appears that he did not file an inventory of the estate within the time required by law, but the objections to his report here reviewed are not based on that ground, and there is no reason to suppose that the estate suffered from that failure. The record discloses immaterial testimony heard by the court, as is usual in the trial of cases without a jury. No error in that respect was committed of which appellant can complain. The controlling facts were established without much contradiction by competent evidence. It seems to us from an inspection of the entire record that appellee performed a duty not of his own seeking in a proper manner; that for years he has been subjected to much labor, annoyance and trouble for which he has not received, and cannot receive, any compensation, and that the only injustice disclosed is, that under the condition of this estate and the law applicable to the administration of estates, appellee could not ask and the court could not give him any compensation for his time and trouble expended in an honest, intelligent effort to perform his duty. The judgment is affirmed.

*Affirmed.*

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Carlisle et al., v. Novak, 196 Ill. App. 385.

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**A. L. Carlisle and G. N. Carlisle, trading as A. L. Carlisle & Son, Appellee, v. John L. Novak, Appellant.**

**Gen. No. 6,077. (Not to be reported in full.)**

Appeal from the County Court of Kane county; the Hon. FRANK G. PLAIN, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.

**Statement of the Case.**

Action by A. L. Carlisle and G. N. Carlisle, trading as A. L. Carlisle & Son, plaintiffs, against John L. Novak, defendant, in the County Court of Kane county, to recover a broker's commission for negotiating the sale of defendant's farm to one Mattsen, a tenant of the farm in question. From a judgment for plaintiffs for \$430.20, defendant appeals.

Plaintiffs introduced a letter from defendant to them, as follows:

"I hereby notify you that I am placing my farm in St. Charles, again on the market, and if you care to handle it on the basis of two per cent. commission, as we formerly agreed upon, I hereby authorize you to sell the farm for \$150 an acre for cash or part cash, and for the balance a mortgage."

Defendant testified, in substance, that he procured the sale of the farm to the buyer in question and that having made a proposal to such buyer, which was rejected by him on account of dissatisfaction with the purchase price proposed, defendant suggested that such buyer submit the terms on which he would purchase, which was done, and defendant accepted the buyer's proposal. Plaintiffs introduced evidence to the effect that after the failure of defendant's negotiations, in accordance with defendant's written request as above stated, they commenced negotiations with Mattsen, inducing him to change his mind and to

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submit the proposal testified to by defendant, which was prepared in their office, which was accepted and the farm sold to him. Plaintiffs' evidence was corroborated by Mattsen. It did not appear from plaintiffs' evidence whether the proposal by Mattsen, after being prepared by them, was submitted to defendant by Mattsen or by themselves.

The case was tried without a jury and the court refused to hold a proposition of law submitted by defendant, as follows:

"That the plaintiff did not earn a commission on the sale of the defendant's real estate to Mattsen by their prior conversations or negotiations, if any, with Mattsen, unless such conversations and negotiations resulted in bringing the defendant and Mattsen into direct negotiations which culminated in a sale."

WALTER TRUC, for appellant.

ROBERT G. EARLEY, for appellees.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

### Abstract of the Decision.

1. **BROKERS, § 90\***—*when evidence sufficient to sustain finding that broker induced buyer to purchase.* In an action to recover a broker's commission for procuring the sale of defendant's farm, where the evidence was conflicting as to whether defendant made the sale or whether such sale was brought about by plaintiffs' efforts after defendant had failed to induce the buyer to purchase, a finding for plaintiffs held not erroneous under the evidence.

2. **BROKERS, § 95\***—*when instruction on right to commission erroneous.* In an action to recover a broker's commission for negotiating the sale of defendant's farm, the buyer being a tenant of defendant, and where the evidence was conflicting as to whether defendant negotiated the sale without the intervention of plaintiffs, or whether, after failure of defendant's negotiations to effect a sale, the efforts of plaintiffs induced such buyer to again consider purchasing such farm, after which all the negotiations were conducted

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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by plaintiffs, a proposition of law to the effect that plaintiffs did not earn a commission by their prior negotiations, if any, with the tenant, unless such conversations and negotiations resulted in bringing the defendant and the tenant into direct negotiations which culminated in a sale, *held* properly refused as an incorrect statement of the law, and as it assumed the disputed fact of direct negotiations between plaintiffs and defendant.

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**William Decker, trading as Montgomery Table Works,  
Appellant, v. Albert Braverman, trading as Spo-  
kane Furniture Company, Appellee.**

**Gen. No. 6,097. (Not to be reported in full.)**

Appeal from the Circuit Court of Peoria county; the Hon. THEODORE N. GREEN, Judge, Presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.

### **Statement of the Case.**

Action of assumpsit by William Decker, trading as Montgomery Table Works, plaintiff, against Albert Braverman, trading as Spokane Furniture Company, defendant, in the Circuit Court of Peoria county, to recover the invoice price of manufactured goods sold and delivered to defendant. From a judgment for defendant, plaintiff appeals.

The controverted matters concern the purchase by the appellee of twelve oak library tables, called "tables in white," which were shipped to the defendant, but which defendant claims were not of the kind and quality purchased by him, and that he therefore returned them to the plaintiff.

The testimony of defendant was to the effect that he gave the order for the "tables in white" to a traveling salesman of plaintiff, to be like certain photographs which the salesman had displayed to him, and also, of the grade of oak, and in the kind of wood

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finish, like a table in defendant's stock; that the grade of wood of the table in defendant's stock was No. 1 oak; and that the finish of the wood was also of the highest grade.

He further testified that the tables sent to him were No. 3 grade of oak, and the wood finish was not clear and smooth like the finish of the table in defendant's stock, but was rough and splintered; and that parts of the tables were very roughly put together. The defendant's testimony was not contradicted.

It also appeared that checks were twice sent by defendant for an amount less than the invoice price of such goods and plaintiff for that reason refused such checks. The goods remained in defendant's warehouse thirty days before he examined them. The amount claimed was \$150 and interest from June 30, 1914. Defendant tendered and paid into court \$56.70. The case was tried by the court without a jury and the only witness was defendant, who was called by plaintiff.

KIRK & SHURTLEFF, for appellant.

A. M. OTMAN, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

### Abstract of the Decision.

1. EVIDENCE, § 461\*—*what weight given to uncontradicted testimony.* Uncontradicted testimony must be taken to be a true statement of the matters testified to.

2. SALES, § 146\*—*when purchaser may reject goods.* A purchaser is not bound to accept and pay for goods which are not of the kind and quality called for by the contract.

3. SALES, § 147\*—*what is reasonable time to accept or reject goods.* The question of what is a reasonable time within which a purchaser of goods must accept or reject the same depends on the circumstances of the particular case.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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4. **SALES, § 147\***—*what is not unreasonable delay in rejecting goods.* In an action to recover for goods sold and delivered where defendant retained the goods in his warehouse for thirty days before examining and rejecting them as not in compliance with the contract, *held* that defendant's delay was not unreasonable under the evidence, he having the right to assume that the goods delivered were in compliance with the contract, in which case defendant would naturally not make haste to examine them.

5. **SALES, § 105\***—*when sending of checks in payment no waiver of compliance with contract.* In an action to recover for goods sold and delivered where defendant retained the goods in his warehouse for thirty days before examining and rejecting them as not in compliance with the contract, the fact that before examination of the goods defendant sent plaintiff a check for less than the invoice price, *held* not to prove a waiver of plaintiff's failure to comply with the contract, defendant not having at the time of sending the checks such knowledge of the defects in the goods that he could be presumed to have intended to waive such defects by sending such checks.

6. **CONTRACTS, § 203\***—*when contract of sale divisible.* In a sale of goods consisting of independent items, of different articles with different prices, each item necessarily constitutes a separate contract.

7. **APPEAL AND ERROR, § 1088\***—*when only errors assigned in brief will be considered.* On a writ of error the Appellate Court can only consider the errors discussed by appellant in his brief, although he declares he relies on all the errors assigned, including some not so discussed, since an appellant must abide by the case made by his opening brief, and if no case is made thereby, the judgment reviewed will be affirmed.

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**J. J. Farley, Appellee, v. George H. Dean and Frances Dean, trading as G. H. Dean and Company, Appellants.**

**Gen. No. 6,103.**

1. **PLEADING, § 387\***—*when general issue sufficient plea.* Where defendant pleads the general issue to a declaration containing only the common counts, a further plea is not required upon plaintiff

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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amending by adding other counts, the general issue being a sufficient plea to such counts.

2. PLEADING, § 453\*—*when written pleas and formal joinder of issue waived.* By going to trial without raising any question as to the lack of pleas, plaintiff waives the necessity for written pleas and for the formal joinder of issue.

3. PRINCIPAL AND AGENT, § 167\*—*when agent not liable for breach of contract negotiated for principal.* One who is not a party to a contract, and has nothing to do with such contract except he negotiated the contract as agent for another, cannot be held liable for a breach thereof.

4. PLEADING, § 431\*—*when variance fatal.* A material variance between a contract declared on and the contract proved is fatal, since the evidence offered in support of a declaration must substantially support the allegations of such declaration.

5. CONTRACTS, 366\*—*what constitutes fatal variance between contract declared on and proved.* In an action to recover on a contract wherein the contract proved was not between the same parties and not in relation to the same subject-matter as that declared on, held that there was a fatal variance, so that a motion by defendant at the close of all the evidence to direct a verdict in its favor should have been sustained.

Appeal from the City Court of DeKalb; the Hon. JOHN A. DOWDALL, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed October 20, 1915. Rehearing denied December 8, 1915.

A. G. KENNEDY, for appellants.

CLIFFE & CLIFFE, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

In this case the appellee, James J. Farley, sued the appellants, George H. Dean and Frances Dean, copartners under the name of G. H. Dean & Company, in assumpsit, in the City Court of DeKalb, and recovered a judgment for the sum of \$350, for the value of a secondhand Maxwell automobile. Appellee claims to have turned this automobile over to the appellants as a first payment on the purchase of a new automobile, which was to be furnished him by the appellants,

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under an alleged contract, and which it is alleged they failed to so furnish.

The first declaration filed contained only the common counts, to which appellants pleaded the general issue. Afterward, by leave of court, the appellee filed three additional counts. In the first additional count, it is alleged, that the appellee, on or about April 6, 1913, entered into an agreement or contract of sale, for one 40-horsepower Maxwell automobile and extra attachments thereto, to be delivered to the appellee on or about May 1, 1913; and that appellee, in consideration of said purchase and the delivery of said automobile to him, agreed to pay the sum of \$1,700 therefor, namely: \$1,135 in cash and one secondhand automobile, of the value of \$575; that appellee was ready and willing to complete said contract and to pay to appellants the \$1,135 balance on said first day of May, 1913, but that appellants failed and refused to deliver to appellee the automobile contracted for, and refused to return to appellee the secondhand automobile which he had turned over to them as first payment, but converted the same to their own use.

Substantially the same allegations are contained in the other additional counts, in regard to the contract entered into, the kind of automobile purchased by appellee, the amount to be paid therefor, the kind and character of payments to be made and the time of making the same; also as to the failure of appellants to deliver the automobile so purchased, to appellee, as agreed; and similar allegations are contained therein, as to the retention and conversion by appellants, of the secondhand automobile, turned over to appellants, by appellee, as a first payment.

No plea was filed by appellants to the additional counts, but this was not necessary as the plea of the general issue on file was sufficient to constitute an answer to the additional counts. *Dubois v. Robbins*, 115 Ill. App. 372; *Wright v. Lessee of Hollingsworth*,

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Farley v. Dean et al., 196 Ill. App. 389.

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1 Pet. (U. S.) 165; *McAllister v. Ball*, 28 Ill. 210; *Eames v. Morgan*, 37 Ill. 260; *Ridgely Nat. Bank of Springfield v. Fairbank*, 54 Ill. App. 296; *Pease v. Bartlett*, 97 Ill. App. 492; *Milwaukee Mechanics' Ins. Co. v. Schallman*, 188 Ill. 213.

Moreover, the parties by going to trial, without raising any question on account of the lack of pleas, waived the necessity of written pleas and formal issues joined. *Brazzle v. Usher*, Breeze 14; *Ross v. Reddick*, 2 Ill. (1 Scam.) 73; *Ryan v. McGirr*, 168 Ill. App. 415; *J. I. Case Threshing Mach. Co. v. Pule*, 175 Ill. App. 190; *Anderson v. Patty*, 168 Ill. App. 151; *Ryan v. McGirr*, 168 Ill. App. 415.

The evidence adduced on the trial clearly shows that the subject-matter of this suit is based on a contract in writing, made by the appellee with the Cole Motor Company through the agents of the company, G. H. Deane & Company, and that the contract is for the purchase of a Cole Model 40-T car, with certain extras mentioned, to be delivered to appellee about May 1, 1913. The contract is as follows:

“Chicago, Ill., 4-5, 1913.  
Phone Calumet 5466.

“Cole Motor Company,  
1470 Michigan Ave.

Gentlemen:

You are hereby authorized to enter my order for one Model 40 T, for which I agree to pay the sum of \$1,135, F. O. B. DeKalb. Hand you herewith Maxwell Dollars as first payment thereon and agree to pay balance on delivery which is to be on or about May 1st, 1913.

The first payment shall be forfeited as liquidated damages if subsequent payment is not made within five days of notice that the car is ready for delivery.

Farley v. Dean et al., 196 Ill. App. 389.

Notice may be sent by mail to the address given below. 49 Extras as follows:

1 tube & casing & chains & cover

Price of car.....

Price of extras.....

Freight .....

Total .....

Deposit .....

Balance due.....

Deposit received and accepted this.....191

Cole Motor Co.,

J. J. Farley,

Purchaser.

Salesman, Quinn

DeKalb,

Address,

Order No.....Ill.

Telephone.”

As a first payment, the appellee turned over to the appellants, as agents of the Cole Motor Company, his secondhand Maxwell car; and by the foregoing contract agreed to make a further payment of \$1,135 on delivery to him, of the Cole car, F. O. B. DeKalb. Appellee claims that there was a breach of this contract, because the car specified in the contract was never furnished nor offered to him by the Cole Motor Company or its agents.

There was no evidence on the trial of any contract between the parties, than the one hereinbefore set out, with the Cole Motor Company. It is clear that the appellants had nothing to do with this contract, except in the capacity as agents of the Cole Motor Company, and were not parties to it and hence could not be held liable for a breach thereof. No evidence was adduced on the hearing, and none appears in the record, to sustain the allegations made in the declaration, of a contract made by appellee with appellants, for the purchase from them of a Maxwell car; nor is there any evidence of any other transaction than that

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Massock v. Royal Ins. Co., 196 Ill. App. 394.

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relating to and connected with the contract heretofore set out; and there is no evidence under which a recovery could be had under the common counts. \*

It is well settled that the proof must substantially sustain the allegations of the declaration. If the contract proved varies materially from the contract stated in the pleadings, it is fatal to a recovery. *Wheeler v. Reed*, 36 Ill. 85; *Kaiser v. Topping*, 72 Ill. 229; Stephen on Pleading, 107; 1 Greenleaf on Evidence, 79.

The contract in evidence is clearly at variance with the contract set out in the declaration. It relates to a different kind of an automobile, and is not between the same parties. In that state of the pleadings and the proofs, the court should have sustained appellant's motion, made at the close of all the evidence, to direct a verdict for the defendants.

The judgment must be reversed and the cause remanded.

*Reversed and remanded.*

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**Jacob Massock, Appellee, v. Royal Insurance Company, Appellant.**

**Gen. No. 6,112. (Not to be reported in full.)**

Appeal from the Circuit Court of Bureau county; the Hon. JOE A. DAVIS, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.

**Statement of the Case.**

Action of assumpsit by Jacob Massock, plaintiff, against the Royal Insurance Company, defendant, in the Circuit Court of Bureau county, to recover on a policy of fire insurance insuring the store building of defendant in Granville, Illinois, in the sum of \$1,700. From a judgment for plaintiff for \$2,006.70 and costs of suit after trial without a jury, defendant appeals.

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Massock v. Royal Ins. Co., 196 Ill. App. 394.

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A reversal of the judgment is asked, on the ground that the appellee did not comply with the provision of the insurance policy, which requires that proofs of loss by fire shall be furnished to the Insurance Company, within sixty days after the loss has occurred; and it is urged that the failure to comply with this provision of the policy bars a recovery.

It does not appear that a proof of claim was ever filed by plaintiff. There was evidence that plaintiff was informed by an agent of defendant, when such agent learned of the fire, that he would notify defendant, whereupon defendant would send an adjuster to adjust the loss. It does not appear that this was done.

CHARLES B. OBERMEYER and CARO A. TRIMBLE, for appellant.

S. P. HALL and BUTTERS & CLARK, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

### Abstract of the Decision.

1. INSURANCE, § 452\*—*when clause requiring proof of loss may be waived.* A stipulation in a policy of fire insurance requiring insured to furnish a proof of loss as a prerequisite to the liability of insured on the policy may be waived by insured or by its agent.

2. INSURANCE, § 455\*—*when provisions of policy requiring waiver in writing attached to policy do not prohibit waiver of proof of loss.* A condition in a policy of insurance requiring steps to be taken by insured after a loss, such as to furnish to insurer a proof of loss, are not within the limitation of another provision of such a policy providing that no officer, agent or other representative of insurer shall have power to waive any provision of the policy except in writing upon or attached to the policy.

3. INSURANCE, § 455\*—*when agent power to waive condition in policy requiring proofs of loss.* An agent of a fire insurance company is empowered to waive a condition in a policy requiring proofs of loss as a prerequisite to the liability of insurer thereon where such agent has authority to solicit insurance and negotiate contracts

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Orr & Lockett Hardware Co. v. Pattison et al., 196 Ill. App. 396.

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therefor within a named territory, although his authority may be local as to such territory.

4. **INSURANCE, § 455\***—*how agent may waive provision of policy requiring proofs of loss.* A condition in an insurance policy requiring insured to furnish proofs of loss as a prerequisite to the liability of insured thereon may be waived by its agent without express words, by conduct inconsistent with an intention to enforce a strict compliance with the condition and which conduct is calculated to lead insured to believe that insurer does not intend to require such compliance.

5. **INSURANCE, § 455\***—*what constitutes waiver of proof of loss by agent.* In an action to recover on a policy of fire insurance which required as a prerequisite to the liability of insurer thereon that insured furnish proofs of loss within sixty days of such loss, which condition was not complied with, *held* that a waiver was proved where it appeared that when informed of the loss defendant's agent assured plaintiff that he would send a notice to insurer as a result of which insurer would send an adjuster who would adjust the loss, plaintiff being entitled to infer from such assurances that his loss would be promptly adjusted without proof of loss, and that insurer would not insist on such proofs being furnished.

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**Orr & Lockett Hardware Company, Appellee, v.  
Charles H. Pattison and Kate Pattison, Appellants.**

**Gen. No. 6,113. (Not to be reported in full.)**

Appeal from the Circuit Court of Lake county; the Hon. CHARLES H. DONNELLY, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.

**Statement of the Case.**

Action by the Orr & Lockett Hardware Company, Plaintiff, against Charles H. Pattison and Kate Pattison, defendants, in the Circuit Court of Lake county.

An appeal from the judgment of the Circuit Court of Lake county, dismissing defendants' appeal, which had been taken from the judgment of a justice of the

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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Orr & Lockett Hardware Co. v. Pattison et al., 196 Ill. App. 396.

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peace, for defendants' failure to comply with the order of the court requiring them to file a new appeal bond. From an order dismissing the appeal for failure to file a new bond, defendants appeal.

Plaintiff recovered a judgment before the justice of the peace. Defendants appealed to the Circuit Court, and filed with the justice a sufficient appeal bond, which the justice accepted and approved, but the bond was lost, or mislaid by the justice, and he therefore failed to return the bond with the other papers and the transcript to the clerk of the Circuit Court as required by the statute.

R. F. FOWLER, for appellants.

H. C. COULSON, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

### Abstract of the Decision.

1. JUSTICES OF THE PEACE, § 192\*—*when appeal not perfected for want of bond and transcript.* Hurd's Rev. St., ch. 79, art. X, sec. 1 (J. & A. ¶ 6976), providing that where an appeal is taken from the judgment of a justice of the peace or police magistrate the justice or magistrate shall return the appeal bond, with the other papers in the case and the transcript of his docket, to the clerk of the court to which the appeal is taken, clearly contemplates that the appeal bond shall, with the transcript and other papers in the case, be on file in the court to which the appeal is taken, and that the appeal shall not be fully completed until the bond and transcript are so filed.

2. JUSTICES OF THE PEACE, § 174\*—*power of Circuit Court to force compliance with statute regulating appeals.* The Circuit Court has power to enforce a compliance with the requirements of the statute on appeals from justices of the peace.

3. JUSTICES OF THE PEACE, § 194\*—*when appeal properly dismissed for failure to file new bond.* An order dismissing an appeal from a justice of the peace held proper where it appeared that the appeal bond originally filed with the justice was lost, and that appellant

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Dyer v. Weinstein, 196 Ill. App. 398.

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failed to comply with an order to file a new bond, such order being reasonable and proper and it being the duty of appellants to comply therewith.

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**Katherine Dyer, Appellee, v. Jacob Weinstein,  
Appellant.**

**Gen. No. 6,119. (Not to be reported in full.)**

Appeal from the Circuit Court of Peoria county; the Hon. N. E. WORTHINGTON, Judge, presiding. Heard in this court at the April term, 1915. Reversed. Opinion filed October 20, 1915. Rehearing denied December 8, 1915.

**Statement of the Case.**

Action of replevin by Katherine Dyer, plaintiff, against Jacob Weinstein, defendant, to recover possession of a diamond ring, the value of which was fixed in the affidavit at seventy-five dollars. The ring not being obtained by the writ, its value was sought to be recovered by a count in trover.

There was evidence tending to show that the ring was the property of plaintiff, who was a prostitute, and that the ring was pawned with defendant. There was also evidence tending to show that the ring was pawned by plaintiff's paramour, one Gosnell, with plaintiff's knowledge and consent and that plaintiff in a large measure intrusted Gosnell with her money and property. From a judgment for defendant, plaintiff appeals.

**J. B. WOLFENBARGER, for appellant.**

**CLYDE CAPRON, for appellee.**

**MR. JUSTICE NIEHAUS** delivered the opinion of the court.

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Beitel v. Beitel, 196 Ill. App. 399.

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### Abstract of the Decision.

1. **REPLEVIN, § 50\***—*when owner of pawned property must pay or tender amount due as prerequisite to action.* One whose personal property has been pawned with her knowledge and consent cannot maintain replevin to recover possession of such property without first paying or tendering the amount due to the pawnee in redemption from the pledge.

2. **TROVER AND CONVERSION, § 28\***—*when owner of pawned property must pay or tender amount due as prerequisite to action.* An action of trover to recover the value of personal property cannot be maintained against a pawnee of such property where it appears that the property was pawned with the knowledge and consent of plaintiff, and that the amount due to the pawnee in redemption of the pledge was not paid or tendered to pawnee before commencing the action.

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### Claire Beitel, Appellee, v. C. T. Beitel, Appellant.

**Gen. No. 6,135. (Not to be reported in full.)**

Appeal from the Circuit Court of Lee county; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed October 20, 1915. Rehearing denied December 8, 1915.

### Statement of the Case.

Action by Claire Beitel, plaintiff, against C. T. Beitel, defendant, in the Circuit Court of Lee county, to recover on a declaration of which three counts in trespass charged an assault on plaintiff by defendant, who was the father of plaintiff's husband, and of which a fourth count charged an alienation by defendant of the affections of such husband. The general issue was pleaded to all counts. From a judgment for plaintiff for five hundred dollars, defendant appeals.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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The People v. Brown, 196 Ill. App. 400.

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WIRICK & WIRICK and JOHN E. ERWIN, for appellant.  
TRUSDELL, SMITH & LEECH, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

### Abstract of the Decision.

1. ASSAULT AND BATTERY, § 22\*—*when loss of comfort, society and friendship of husband element of damages.* The loss of the comfort, society and friendship of plaintiff's husband is not a proper element of damages in an action against the father of such husband to recover for an assault alleged to have committed on plaintiff by such father.

2. ASSAULT AND BATTERY, § 17\*—*when instruction misleading and prejudicially erroneous.* In an action by a wife against the father of her husband, where in her declaration plaintiff in three counts of trespass alleged an assault upon her by defendant, and in a fourth count alleged that defendant alienated the affections of such husband whereby plaintiff was "deprived of the support, society assistance and affection of her said husband," an instruction that the jury might "award her such damages as they believed from the evidence she had sustained in the loss of the comfort, society and friendship of her husband, *held* misleading and prejudicially erroneous where defendant was found guilty on the first three counts, in that such instruction was not limited to the fourth count, since without such limitation such instruction stated a wrong measure of damages as to the counts on which defendant was found guilty.

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**The People of the State of Illinois, Defendant in Error,  
v. Moses Brown, Plaintiff in Error.**

**Gen. No. 6,068. (Not to be reported in full.)**

Error to the Circuit Court of DeKalb county; the Hon. MAZZINI SLUSSER, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 20, 1915.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Strickland v. Strickland et al., 196 Ill. App. 401.

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### Statement of the Case.

Prosecution by the People of the State of Illinois against Moses Brown, defendant, in the Circuit Court of DeKalb county. To reverse a judgment of conviction, defendant prosecutes this writ of error.

JAMES W. CLIFFE, for plaintiff in error.

LOWELL B. SMITH, for defendant in error; E. M. BURST, of counsel.

PER CURIAM.

### Abstract of the Decision.

1. CRIMINAL LAW, § 344\*—*when proper to receive verdict in absence of defendant.* In a misdemeanor case it is not error to receive a verdict while defendant is absent from the court room on bail.

2. CRIMINAL LAW, § 592\*—*when judgment affirmed by operation of law.* Where one of the judges of the Appellate Court is disqualified and the others are divided in opinion as to whether a judgment should be affirmed or reversed, the judgment is affirmed by operation of law.

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**Elizabeth Strickland, Executrix, Appellee, v. Alexander H. Strickland and Elizabeth Hibbs, Appellants.**

**Gen. No. 6,143. (Not to be reported in full.)**

Appeal from the Circuit Court of Woodford county; the Hon. THOMAS M. HARRIS, Judge, presiding. Heard in this court at the October term, 1915. Transferred to Supreme Court. Opinion filed October 22, 1915.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Strickland v. Strickland et al., 196 Ill. App. 401.

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### Statement of the Case.

Bill by Elizabeth Strickland, in her own right and as executrix, complainant, against Alexander H. Strickland and Elizabeth Hibbs, defendants, in the Circuit Court of Woodford county, praying for a construction of the will of James M. Strickland, deceased. The main question involved was whether defendants took a contingent or a vested remainder in testator's real estate under the will sought to be construed. From a decree that defendants took a contingent remainder in such real estate, defendants appeal.

KIRK & SHURTLEFF, for appellants.

BOSWORTH & BOSWORTH and RIELY & RIELY, for appellees.

PER CURIAM.

### Abstract of the Decision.

1. APPEAL AND ERROR, § 126\*—*when question of freehold involved on appeal from decree construing will.* On appeal from a decree construing a will disposing of both real and personal property, which will, after making certain specific bequests of personalty, devised to testator's wife, for her use during her natural life, all the remaining property of testator, with remainder to others after the termination of the life estate, an assignment of error asking a remand with mandate to determine and decree that such residuary legatee took only a life estate in testator's real estate, *held* to raise a question of freehold, in that the determination asked for does not give to such residuary legatee power to sell such real estate.

2. APPEAL AND ERROR, § 123\*—*when Appellate Court no power to determine question of freehold.* The Appellate Court has no legal power to determine a question of freehold.

3. APPEAL AND ERROR, § 123\*—*when cause involving freehold transferred to Supreme Court.* Where a cause appealed to the Appellate Court involves a question of freehold, the cause must be transferred to the Supreme Court under section 102 of the Practice Act (J. & A. § 8639), providing for the disposition of cases improperly appealed.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Fiedler v. Chicago, etc., R. Co., 196 Ill. App. 403.

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**Richard Fiedler, Appellee, v. Chicago, Indiana & Southern Railroad Company, Appellant.**

**Gen. No. 6,099. (Not to be reported in full.)**

Appeal from the Circuit Court of Putnam county; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed November 5, 1915.

**Statement of the Case.**

Action by Richard Fiedler, plaintiff, against the Chicago, Indiana & Southern Railroad Company, defendant, in the Circuit Court of Putnam county, to recover the value of a steer alleged to have been killed as a result of defendant's negligence. From a judgment for plaintiff for eighty-five dollars defendant appeals.

On August 17, 1911, Richard Fiedler owned and occupied a farm near Granville, in Putnam county, which was crossed by the Chicago, Indiana & Southern Railroad Company. The right of way across this farm was separated from the farm land by a fence, erected and maintained by defendant, and at one point in this fence there was a gateway leading to a private crossing over the track. On the day in question a steer belonging to Fiedler was killed by a train of the defendant and it is claimed by Fiedler that the gate was out of repair due to negligence of the railroad company, by reason of which the steer passed through the gate and upon the right of way.

The evidence showed that the gate in question consisted of a steel frame about fourteen feet wide and sixteen feet long, hung from a post by hinges on one end, and on the other end originally fastened to another post by an iron hook; that the hook had been broken more than a year before the date in question and the gate had been fastened thereafter by wrapping wires around the end of the gate and the post and



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Fiedler v. Chicago, etc., R. Co., 196 Ill. App. 403.

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twisting them; that one of the posts by which the gate was fastened had become rotten and that the section men of the defendant had not removed the rotten post, but had put in a new post alongside of the old one; and that the gate would not reach from one post to the other. The evidence further showed that after the killing of the steer the gate was found open towards the right of way, although the natural way to open it was away from the right of way, and that the wires that had held the gate shut were lying on the ground. There was evidence in the record to the effect that hunters had been seen in the neighborhood on the morning in question, but there was no evidence directly showing that such hunters were on the premises at that time or near this gate, while there was other evidence showing that cattle of appellee had broken through this gate on other occasions and that defendant's servants had promised several times to repair this gate in a suitable manner.

The action was tried by jury in the Circuit Court on appeal from the judgment of a justice of the peace, and the jury found for plaintiff, the value of the steer being agreed to be sixty dollars and the value of plaintiff's attorney's fees to be twenty-five dollars.

BOYS, OSBORN & GRIGGS, for appellant; ROBERT J. CARY, of counsel.

GEORGE W. HUNT, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

### Abstract of the Decision.

1. RAILROADS, § 868\*—*when evidence sufficient to sustain finding that gate along right of way not opened by human agency.* In an action to recover for the alleged killing of plaintiff's steer by defendant's train, where it appeared that the steer got on defendant's right

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Fiedler v. Chicago, etc., R. Co., 196 Ill. App. 403.

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of way through a gate in a fence separating defendant's right of way from plaintiff's land, both gate and fence being constructed and maintained by defendant; that the gate swung on hinges from a post in the fence and was formerly fastened by an iron hook to a post set on the opposite side of the opening, and after the hook was broken defendant did not repair it, but fastened the gate by twisting wires round the end of the gate and the post; that after the accident the wires were found lying on the ground untwisted; that after the post had become rotten defendant set a new post alongside the old post, so that the gate did not reach to the new post; that the gate had been pushed open by cattle on other occasions, and that on the day of the accident hunters were seen in the vicinity, *held* that the evidence did not exclude the possibility that on the day in question the gate was pushed open by cattle so as to warrant an inference that it was not opened by human agency.

2. WITNESSES, § 197\*—*when paper used by witness to refresh memory may not be used by adverse counsel.* Where a paper from which a witness has refreshed his recollection as to the facts to which he testifies contains expressions of opinion, and such witness after examination of the paper testifies to all the matters of fact therein contained, so that the witness could not be contradicted by the admission of the paper, it is incompetent as evidence.

3. EVIDENCE, § 365\*—*when opinion evidence improper.* Opinion evidence is properly excluded where there is no occasion for expert testimony, and where the jury are as well qualified as the witness to decide the question as to which the opinion is sought.

4. INSTRUCTIONS, § 41\*—*when instruction not rendered improper by insertion of words limiting province of jury.* The insertion of the words "if proven" in an instruction requested by a party, which instruction commences "if the jury believe from the evidence," is not objectionable as shifting the burden of proof, the words inserted being of the same meaning as "if the jury believe from the evidence," and the words so inserted being merely an unnecessary repetition of what was already expressed.

5. APPEAL AND ERROR, § 1241\*—*when party may not complain of his own instructions.* The fact that an instruction given put an improper burden on a party to an action cannot be assigned by such party as error where the instruction complained of was requested by it.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Kimmel v. Gray, 196 Ill. App. 406.

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**Charles A. Kimmel, Appellee, v. William A. Gray,  
Appellant.**

**Gen. No. 6,121. (Not to be reported in full.)**

Appeal from the Circuit Court of Peoria county; the Hon. THEODORE N. GREEN, Judge, Presiding. Heard in this court at the April term, 1915. Affirmed in part and reversed in part. Opinion filed November 5, 1915.

**Statement of the Case.**

Bill by Charles A. Kimmel, complainant, against William A. Gray, defendant, in the Circuit Court of Peoria county, to enforce a written contract. The action was originally at law, but after a demurrer had been sustained, plaintiff obtained an order transferring the cause to the chancery side of the docket with leave to file a bill against defendant, and to add codefendants. The bill when filed set out a written contract between complainant and defendant from which it appeared that the contract was in settlement of a suit between complainant and one not a party to the action.

It was therein agreed that Kimmel should dismiss said suit, and should release Gray from any claims which Kimmel had against him growing out of transactions in stock, and should quitclaim to Gray and give him the right of possession of certain described real estate, and that Kimmel should assign to Gray a certain judgment Kimmel obtained against Charles D. Dubois, which judgment Gray should use, if necessary, in a certain matter and, if not so used, then that Gray should reassign said judgment, or so much thereof as might remain unsatisfied, to Kimmel. Gray therein agreed to organize a corporation under the laws of Arizona, with a capital stock of 500,000 shares of the par value of \$1 per share, of which 20,000 shares should be delivered to Kimmel, out of 200,000 shares. By this agreement certain specified mining properties

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Kimmel v. Gray, 196 Ill. App. 406.

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were to be transferred to the company named, and, if said judgment was not used by Gray, then he should reassign the judgment to Kimmel and said 20,000 shares of stock issued to Kimmel should be a settlement in full of the matters described in said contract, but if said judgment was used by Gray for the purposes specified, then Kimmel was to receive 5,000 more shares of said capital stock. Said stock was to be delivered within six months. The contract contained other provisions not material here. The bill averred that Kimmel had performed his part of said contract; that Gray did organize said mining company upon a capitalization of \$500,000 divided into 500,000 shares; that Gray afterwards changed the name of said company to Mexico Development Company, and increased the capital stock to \$5,000,000 divided into 5,000,000 shares, without adding anything to the assets of the company, and fraudulently issued to Kimmel only 20,000 shares of said last-named capital stock, whereas Kimmel was entitled to 200,000 shares of said last-named company besides 50,000 more shares in lieu of the 5,000 shares of the first-named company which Kimmel was to receive for the use of the judgment, which judgment it was alleged Gray used and refused to account for and refused to reassign to Kimmel, though requested by Kimmel to do so. The bill further alleged that afterwards, by agreement between said Mexico Development Company and Gray on behalf of Kimmel, 200,000 shares of said last-named company were placed in the hands of Charles C. Dutch, as trustee, to abide the result of the pending suit, and that Dutch holds said stock in trust, subject to the adjustment of the rights of Kimmel and Gray in this litigation; that before the beginning of this suit at law Kimmel demanded said stock of Gray and also demanded that the company withhold delivery to Gray of 230,000 shares of stock to which Kimmel was entitled and that Gray refused the demand. The prayer of the bill,

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Kimmel v. Gray, 196 Ill. App. 406.

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besides an injunction, sought to have 230,000 shares of said stock delivered to Kimmel. The bill was twice amended. Gray answered, alleging performance and denying Kimmel's construction of the contract. Dutch and the Mexico Development Company filed a joint answer, in which they denied that Dutch held any stock for the use of Kimmel. All the defendants alleged that Kimmel had an adequate remedy at law. The cause was referred to the master to take and report the evidence with his conclusions of law and fact. The master took and reported the evidence and reported that Kimmel had performed his part of the agreement; that Gray had performed his part of the agreement as to the 20,000 shares; that Gray had not used the judgment but had testified that he was ready to reassign it and that Kimmel was not entitled to any relief on account of said judgment; that said reorganization and increase of capital stock was made with Kimmel's knowledge and without objection by him; that 20,000 shares of the reorganized corporation was delivered to and accepted by Kimmel, but under a protest and claim that he was entitled to 230,000 additional shares; that this claim by Kimmel had not been established with sufficient definiteness to justify a decree therefor; that Kimmel could have readily purchased upon the market said shares of stock and has a complete remedy at law, and that a court of equity is without jurisdiction; that after notice from Kimmel the board of directors of the company voted to retain 200,000 shares of the stock owned by Gray to await the outcome of this litigation, and issued said stock to Charles C. Dutch, and that Gray as a director voted for such action, but that this action was taken to protect the company and was not in trust for Kimmel. The master overruled objections by Kimmel to said report and these were renewed as exceptions before the Circuit Court. The Circuit Court decreed that Dutch should transfer to Kimmel 180,000 shares of said stock

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Kimmel v. Gray, 196 Ill. App. 408.

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owned by Gray, and that Gray should reassign said judgment within ten days, and to that extent sustained the exceptions to the master's report.

From a decree sustaining the exceptions of the master's report in part and ordering that defendant Dutch transfer to complainant 180,000 shares of said stock owned by defendant Gray, and that defendant Gray reassign said judgment to complainant within ten days, defendant Gray appeals.

JUDSON STARR, for appellant.

W. S. KELLOGG, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

### Abstract of the Decision.

1. SPECIFIC PERFORMANCE, § 46\*—*when equity will compel delivery of corporate stock.* Where stock which is easily obtainable in the market is contracted to be sold but is not delivered, the purchaser is left to his remedy at law for damages, no special reason appearing why such purchaser should have the particular stock contracted for, but where the value of such stock is not easily ascertainable, or is not readily obtainable elsewhere, or where some reasonable cause is shown why vendee should have that particular stock, equity will compel its delivery.

2. SPECIFIC PERFORMANCE, § 46\*—*when delivery of stock having no market value compelled.* One who has a contract right to the delivery of particular stock should be permitted to maintain a bill to compel its delivery where the stock in question has no present market or other tangible value, never having been listed or offered on the market, and is only salable by one man having special skill in inducing persons of means to buy stock for pure speculation, especially where, owing to the fact that the company issuing the stock has no means of procuring the equipment necessary to operate its plant and is unable to get its product to market, it does not yet appear whether such product can be sold at a profit, since until all these things are accomplished such stock is not likely to have a market or other value which can be fixed or ascertained by the courts.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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3. **EQUITY, § 23\***—*when jurisdiction retained to grant specific performance of contract to deliver stock.* In a bill alleging that complainant assigned a judgment to defendant under an agreement that if the judgment was used by defendant in a certain manner defendant should deliver to plaintiff in full payment for such judgment a named number of shares of a particular stock, and where in his answer to the bill defendant denies that he so used the judgment, and offers to reassign it, complainant has the right to resort to a court of equity to obtain a determination of the controverted question as to whether defendant used the judgment in the manner agreed, and if it should be determined that he has not, to compel such reassignment in accordance with the terms of the agreement, defendant's offer in his answer to reassign not investing complainant with title to the judgment.

4. **EQUITY, § 23**—*when jurisdiction retained to administer further relief.* Where equity has jurisdiction it will proceed to administer all the relief required by the subject-matter of the action, notwithstanding the fact that as to part of the relief required complainant had an adequate remedy at law.

5. **SPECIFIC PERFORMANCE, § 93\***—*when decree requiring delivery of specified number of shares of stock erroneous on complainant's theory.* In a bill to compel the delivery of shares of particular stock under a contract whereby complainant was entitled to receive 20,000 shares of the stock of a corporation to be formed by defendant, which should be authorized to issue 500,000 shares, of which 400,000 shares should remain in the treasury and 100,000 shares be taken by stockholders, where the capitalization was later increased tenfold, but the proportion of stock retained in the treasury and that issued to stockholders was the same as that of the original capitalization, and where complainant claimed to be entitled to the same proportion of stock under the increased as under the original capitalization, a decree that defendant deliver to complainant 180,000 shares of such stock, *held* erroneous on complainant's theory, complainant claiming to be entitled to one-tenth of the total increased capitalization, or 100,000 shares, and it appearing that 20,000 shares had been received by complainant, the amount which should have been decreed to him on his own theory being 80,000 shares.

6. **SPECIFIC PERFORMANCE, § 91\***—*when evidence insufficient to sustain claim in bill for additional shares of stock.* In a bill to compel the delivery of shares of particular stock of a corporation to be organized by defendant, where it appeared under a written contract that a named number of shares of such stock had been delivered as provided therein, but complainant alleged that the capitalization of the corporation had been increased by defendant without adding

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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to its assets, and that under a verbal agreement made with defendant after the execution of the written contract plaintiff was entitled to an additional number of shares of such stock, such additional number claimed bearing the same proportion to the total capitalization as increased as the number of shares delivered bore to the original capitalization, evidence *held* insufficient to sustain the claim made in the bill.

7. SPECIFIC PERFORMANCE, § 13\*—*when agreement for delivery of additional shares of stock too uncertain to be enforceable.* In a bill to compel the delivery of shares of particular stock, an agreement alleged in the bill that defendant verbally agreed to deliver a number of shares of such stock in addition to the number already delivered under a written contract, which additional number should bear the same proportion to the total capitalization as the number actually delivered bore to the original capitalization, *held* too indefinite and uncertain to be enforced by a court of equity.

8. CORPORATIONS, § 169\*—*when person not in possession of stock certificate a stockholder.* Where a person is shown by the records of a corporation to be a stockholder therein, and such person acts as such stockholder after the organization of such corporation, and obviously considers himself a stockholder, he will be regarded as such although he never had manual possession of the stock certificate, it appearing that in pursuance of a contract such certificate was duly made out in his name and delivered to another person to be delivered to such stockholder, but never actually delivered.

9. CONTRACTS, § 309\*—*what constitutes performance of contract to deliver stock.* A contract for the delivery of shares of particular stock is fully performed, although manual possession of the certificate of such stock is never delivered to vendee, where it appears that the certificate was duly made out by the proper officers of the company issuing the stock and delivered to vendor to be delivered to vendee, and afterwards vendee acted as such stockholder, and obviously considered himself such.

10. SPECIFIC PERFORMANCE, § 77\*—*when necessary that bill allege conversations taking place after execution of contract.* In a bill to compel the delivery of shares of particular stock where the bill relies on a contract set out therein, rights based on oral conversations which took place after the execution of the contract cannot be taken advantage of without some pleading alleging such rights.

11. SPECIFIC PERFORMANCE, § 13\*—*when equity will not enforce oral contract.* An oral contract which is uncertain in its terms and which is not adequately proved will not be enforced by a court of equity, although properly pleaded.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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12. CORPORATIONS, § 83\*—*when consent of minority stockholder not necessary to increase of capital stock.* The consent of a stockholder owning a small minority of the stock is not necessary in order to enable a stockholder owning a large majority of the stock to increase the capitalization, although such minority stockholder received no additional shares when the capitalization was increased, and although such majority stockholder received a large number of additional shares, where it appears that all minority stockholders were treated alike, and the evidence shows that such majority stockholder had conveyed valuable property to the corporation in return for the additional stock received by him.

13. SPECIFIC PERFORMANCE, § 91\*—*when evidence sufficient to show that judgment not used as contemplated in contract.* In a bill to compel the delivery of shares of particular stock under a contract whereby complainant assigned to defendant a judgment and provided that if defendant used the judgment as provided by the contract defendant should deliver complainant a named number of the shares of such stock, but otherwise should reassign the judgment to complainant, evidence held to show that defendant did not use the judgment as provided in the contract.

14. SPECIFIC PERFORMANCE, § 93\*—*when reassignment of judgment properly decreed.* In a bill based on a contract which provided that complainant should assign to defendant a judgment, which, if used by defendant in a manner provided by the contract, should be paid for as provided therein, and, if not so used, should be reassigned to complainant, a decree that defendant reassign such judgment to complainant, held proper, where it appeared from the evidence that the judgment was not used by defendant as contemplated by the parties.

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**Chicago & Alton Railroad Company, Appellant, v.  
Woolner Distilling Company, Appellee.**

**Gen. No. 6,124. (Not to be reported in full.)**

Appeal from the Circuit Court of Peoria county; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed November 5, 1915.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Chicago & Alton R. Co. v. Woolner Distilling Co., 196 Ill. App. 412.

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### Statement of the Case.

Action by the Chicago & Alton Railroad Company, plaintiff, against the Woolner Distilling Company, defendant, in the Circuit Court of Peoria county, to recover for demurrage. From a judgment for defendant, plaintiff appeals.

This is one of six suits brought by six railroads against the appellee, Woolner Distilling Company, for demurrage. Two of the suits have before reached this court, and are reported as *Woolner Distilling Co. v. Peoria & E. Ry. Co.*, 136 Ill. App. 479, and *Chicago, P. & St. L. Ry. Co. v. Woolner Distilling Co.*, 160 Ill. App. 192. The present case, with four of the others, was referred to a referee by an order of court, to find and report the facts, and with power to take evidence, which should be reported with conclusions of fact therefrom. The referee reported in accordance with the order, in part based on evidence heard and in part on an agreement of the parties, in which report was included a finding as follows: "I further find from the evidence that the defendant detained cars on which plaintiff is entitled to claim demurrage as set out in 'Schedule A,' and made a part hereof, the total number of days' detention being 2,985 days.

"I further find from the evidence that the total number of cars for the Woolner Distilling Company standing each day in the Kickapoo Tracks waiting unloading from March 30, 1904, to March 23, 1905, are as set out in 'Schedule B' hereto attached and made a part of this report, the data for Schedule 'B' being said 'Exhibit 39B.' "

The court overruled exceptions to the report, and the cause was tried by jury, in which uncontroverted evidence was introduced by the plaintiff that there was a customary and usual charge for holding cars longer than "free time" of one dollar a day excluding holidays and Sundays. Then the plaintiff offered the

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referee's report with the schedules made a part of it, as showing the amount of time of delay on each of the cars, and the number of days that the cars in question were detained by the defendant. The defendant objected on the ground that the report is a part of the pleadings in the case, and that the findings of the referee are not proof of the acts in the case. The court sustained the objection, stating as a reason: "It is conceded by both plaintiff and defendant in this case and statements in open court to the jury were made, both on behalf of the plaintiff as well as the defendant, that there would be no dispute as to the time of shipment of the various cars carrying coal from Springfield and elsewhere to Wesley City or the City of Peoria the time of the arrival of the cars carrying coal either to Wesley City or Kickapoo Yards in the City of Peoria, or the time the cars were, in fact, delivered to the defendant company at its plant at Peoria." Then plaintiff introduced in evidence a schedule that was part of the report and suggested that the heading of the page reading "Time for which plaintiff is entitled to charge demurrage" be eliminated, and defendant's counsel said they would not object and stated that they would agree that Exhibit 39B is a true history of the cars as disclosed by the books of the railroad company, and by the defendant's books. Then other schedules and parts of the report were offered separately by the plaintiff, and the court sustained objections to their introduction on the ground that it was not a matter for the jury to pass upon. The plaintiff introduced evidence of admissions by the manager of the defendant that there was something due the plaintiff for demurrage charges, and rested. The defendant then offered evidence tending to account for the delay in unloading cars, attributing such delay to the nonaction and misconduct of the plaintiff.

The jury found for defendant and the court overruled a motion by plaintiff for a new trial.

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FRANK T. MILLER and JOHN M. ELLIOTT, for appellant; STEVENS, MILLER & ELLIOTT and SILAS H. STRAWN, of counsel.

WEIL & BARTLEY and QUINN & QUINN, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

### Abstract of the Decision.

1. CARRIERS, § 211\*—*when evidence insufficient to sustain finding that nothing due for demurrage.* In an action to recover for demurrage by reason of unreasonable delay in unloading freight cars, evidence held, when read as an entirety, not to warrant the conclusion that nothing was due from defendant to plaintiff.

2. NEW TRIAL, § 52\*—*when verdict should be set aside as against evidence.* In an action where the evidence shows that plaintiff is entitled to recover for some amount, it is error to deny a motion for a new trial after a verdict for defendant.

3. APPEAL AND ERROR, § 783\*—*when failure of judge to attach certificate to additional bill of exceptions fatal.* The Appellate Court will not consider on review questions presented in an additional bill of exceptions not certified to by the judge of the court appealed from.

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## C. Hacker Company, Appellant, v. City of Joliet et al., Appellees.

Gen. No. 6,129.

1. STIPULATIONS, § 16\*—*when stipulation construed as providing for final judgment whether injury to land by vacation of street actionable.* In an action to recover compensation for depreciation in the value of land due to the vacation of part of a street in the neighborhood, where after testimony had been introduced as to the amount of such depreciation parties agreed that the court should determine first whether plaintiff could recover on the evidence introduced, and, if the court so held, further evidence of depreciation

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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should be introduced, and if not, plaintiff would appeal, *held* that the intention of parties in making the agreement was to obtain a final judgment whether the injuries complained of were actionable.

2. MUNICIPAL CORPORATIONS, § 450\*—*when opinion evidence as to depreciation in value of land due to vacation of street inadmissible.* In an action to recover compensation for depreciation in the value of land as the result of the vacation of part of a street in the neighborhood, opinion evidence as to such depreciation is incompetent until the question as to liability for the injury causing the depreciation has been determined.

3. TRIAL, § 195\*—*when verdict improperly directed.* Where plaintiff has a right of action to recover compensation for depreciation in the value of his land due to the vacation of part of a street in the neighborhood, it is error to direct a verdict for defendant if there is any evidence of a pecuniary loss as a result of such vacation, whether such loss be great or small.

4. MUNICIPAL CORPORATIONS, § 450\*—*when evidence sufficient to show decrease in traffic after vacation of part of street.* In an action to recover compensation for depreciation in the value of plaintiff's land as a result of the vacation part of a street in the neighborhood, evidence *held* to show that the amount of traffic by vehicles past plaintiff's property had been materially decreased as a result of such vacation.

5. WORDS AND PHRASES—*market value of urban property.* The market value of urban property depends much upon the amount of travel past such premises, and is therefore increased or decreased by considerations affecting such travel, such as the location of other properties of public improvements, and the improvement or non-improvement of the streets leading to or past such property.

6. MUNICIPAL CORPORATIONS, § 424\*—*when abutting property owner no right to damages for vacation of street.* Generally an owner of property abutting a public street has no right of action because of the vacation of a street at some distance from his property, or because of the suspension or removal of some business, public or private, which drew travel in the direction of such property, although the value thereof is lessened thereby.

7. MUNICIPAL CORPORATIONS, § 424\*—*when abutting property owner not entitled to damages for vacation of street.* Owners of land abutting a public street are not entitled to damages by reason of the vacation or discontinuance of a neighboring or other street, or of the same street when the point where the street is vacated or discontinued is beyond the cross street next after the location of such owner's land, although its value may be lessened by such vacation or discontinuance.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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8. ACTION, § 5\*—*when private individual no right of action for act obstructing a public right.* No private action will lie for any act obstructing a public and common right where the damages sustained thereby are of the same *kind* as those sustained by the general public, although such injury has a much greater effect on the value of the property of the owner seeking compensation than on the value of property of other owners.

9. ACTION, § 25\*—*what individual must prove to entitle him to redress for interference with common public right.* An owner of a house must be compensated for a physical interference with a right which the owner is by law entitled to use in connection with the house except where the right interfered with is one which is possessed in common with the public, in which case to entitle him to compensation the owner must show that the connection of the right with the house is peculiar in some way and sufficient to distinguish his use of the right from the use enjoyed by the public.

10. WORDS AND PHRASES—*access.* The courts use the words "ingress" and "egress" interchangeably with the word "access."

11. MUNICIPAL CORPORATIONS, § 423\*—*when right of access to property abutting street may not be interfered with.* The right of an owner of property abutting a public street to access thereto, from or by way of such street, and his right of ingress and egress to and from such street cannot be interfered with by the construction of a public improvement without compensation.

12. MUNICIPAL CORPORATIONS, § 423\*—*what is nature of right to access to property abutting street.* Owners of property abutting a public street have, as an incident to such ownership, a right of access by way of the streets.

13. MUNICIPAL CORPORATIONS, § 423\*—*what constitutes access to real estate from street.* It is difficult to define exactly the meaning of the word "access" as used with reference to real estate abutting a street, its meaning not being confined to the exact point where such real estate abuts upon such street, and being not capable of being so extended as to make an interference with or obstruction of the use of such street at a point two or three blocks away from such land an interference with or obstruction of such access, unless it appears that such owner is specially and particularly injured thereby.

14. MUNICIPAL CORPORATIONS, § 424\*—*when inconvenience in reaching a street formerly accessible from partly vacated street common to all using street.* Where the vacation of part of a street on which an owner's property abuts compels persons passing from such owner's property to go considerably further to reach a street formerly accessible directly from the street vacated, the inconvenience sustained

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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thereby is one which results to all wherever located who have occasion to use that route.

15. MUNICIPAL CORPORATIONS, § 424\*—*when immaterial that damage sustained by abutting property owner from vacation of street greater than that of others.* There is no significance in the fact that an owner of property abutting a public street sustains damage in the depreciation of the value of such property by reason of the vacation of part of such street "in excess" of that sustained by other owners similarly situated if the damage sustained by such owner is of the same kind as that sustained by such other owners.

16. MUNICIPAL CORPORATIONS, § 424\*—*when closing of street injury to abutting property owner distinct from public injury.* The closing of a street, whereby the street is converted into a blind court in front of the premises of an abutting owner, is an injury distinct from that suffered by the general public.

17. MUNICIPAL CORPORATIONS, § 424\*—*when closing of street damnum absque injuria.* Damage sustained by an owner of property abutting a public street as a result of the vacation of a street or alley is *damnum absque injuria* and gives no right of action where the damage sustained is of the same kind and character as that sustained by the general public, differing therefrom only in degree.

18. MUNICIPAL CORPORATIONS, § 424\*—*when abutting property owner not entitled to damages for vacation of part of street.* In an action to recover compensation for depreciation in the value of land owing to the vacation of part of the street which plaintiff's land abutted, *held* that plaintiff had no cause of action where it appeared that after such vacation plaintiff still had unobstructed access to his property from one end of such street, and that as to the other end, such access was only partially obstructed, pedestrians being able to pass along the street without obstruction, and vehicles being compelled merely to travel several blocks further in order to reach those parts of the city which before such vacation might be reached directly by such street.

19. MUNICIPAL CORPORATIONS, § 424\*—*when depreciation in value of land abutting partly vacated street due to proper operation of railroad.* In an action to recover compensation for depreciation in the value of land due to the vacation of part of a street which the land abutted, such vacation being the result of an elevation of an existing railroad right of way in obedience to a municipal ordinance, and also by reason of the fact that after such tracks were elevated the trains of another railroad company were operated on such right of way, *held* that the depreciation complained of arose solely from the legitimate and proper operation of the railroad, although there was an increase of noise, dust and confusion, and although plain-

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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tiff's light and air were appreciably obstructed by the construction of the embankment, it appearing that there was no physical interference with the *corpus* of plaintiff's property.

20. MUNICIPAL CORPORATIONS, § 421\*—*when owners of city property not entitled to recover for decreased value due to legitimate use of other property.* The market values of all urban properties are subject to the increase and decrease due to legitimate uses which adjacent owners may make of their lands, and the owners of such urban properties are only required to pay for increased values and are not allowed to recover for decreased values as a result of such uses.

21. MUNICIPAL CORPORATIONS, § 450\*—*when person purchasing property adjacent to railroad tracks presumed to purchase subject to legitimate use of right of way.* One who purchases property adjacent to an existing railroad track, and conducts on such property a manufacturing business to which the advantage of being near such a track is absolutely necessary, is presumed to have so purchased with a view to such advantages and to the disadvantages which may arise in the legitimate use of the right of way for railroad purposes.

Appeal from the Circuit Court of Will county; the Hon. FRANK L. HOOPER, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed November 5, 1915.

E. MEERS and J. W. D'ARCY, for appellant.

FRANK J. WISE, SNAPP, HEISE & SNAPP and O'DONNELL, DONOVAN & BRAY, for appellees.

MR. JUSTICE CARNES delivered the opinion of the court.

C. Hacker Company, the appellant, owned for many years prior to 1911 a manufacturing plant in the City of Joliet fronting westerly and abutting eighty feet on Collins street, and extending easterly along the right of way of the Michigan Central Railroad Company on the south about three hundred feet. It acquired its title after the purchase and occupancy by the railroad company of its adjacent right of way, and from the same source. In 1911 the railroad company, in elevating its tracks pursuant to an ordinance of the City of Joliet requiring such elevation, permanently closed

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Collins street to travel by vehicles at a point about thirty feet south of appellant's property where a subway fifteen feet wide for foot passengers only was constructed in the place of the grade crossing of the Michigan Central Railroad Company that had before been at that place. The Chicago, Rock Island & Pacific Railway Company, after the elevation of the tracks, operated its trains on the right of way of the Michigan Central Company adjacent to appellant's premises and across Collins street. The result of this changed condition was to increase the traffic on the Michigan Central right of way adjoining appellant's premises, and because thereof, and perhaps also because of the elevation of the tracks, to increase noise, dust, soot, cinders, odors, smoke and vibration occasioned by the operation of the road. The raising of the embankment south of appellant's premises to some extent obstructed the view therefrom. This action was brought against the City of Joliet and the two companies to recover for the alleged injuries occasioned by the improvement. The principal claim is that the closing of Collins street to travel by vehicles has interfered with appellant's ingress to and egress from its premises.

To a declaration setting out the facts above stated, appellees pleaded the general issue. On a jury trial appellant introduced evidence of what had been done, and of the opinions of witnesses that the market value of appellant's premises had been much diminished thereby. Then it was agreed by counsel that the court should determine whether there was any basis for recovery on the evidence so far introduced. If he should hold there was, then further testimony should be introduced. If he held there was not, then the plaintiff would appeal. Each of the appellees moved the court to exclude all evidence (specified in some detail) upon which a verdict could be based, apparently upon the theory that none of the injuries which the evidence tended to prove gave appellant a cause of action. Ap-

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pellees also moved the court to strike out the opinion evidence of witnesses as to the depreciation of the market value of appellant's premises on the theory that the examination of the witnesses showed that their estimate of damages was based, in part at least, on elements that could not be properly considered. The court sustained all these motions and granted further motions by appellees to direct a verdict of not guilty. Judgment on the verdict followed, from which this appeal is prosecuted.

The intention of the parties and the trial court was to obtain a final judgment as to which, if any, of the injuries complained of are actionable. Until that question is settled, opinions of witnesses cannot be obtained as to depreciation in market value from injuries that give a legal cause of complaint. We are inclined to hold that if appellant has a cause of action for any injury resulting from the change in Collins street there was evidence tending to show a pecuniary loss from that cause alone, and, if so, the court erred in directing a verdict for the defendants, and it is immaterial on that question whether the injury was great or small.

Collins street, as platted and used before the time in question, entered Washington street about one hundred feet south of appellant's property. Washington street runs in an east and west direction, and Jefferson street, running in a southeasterly direction, enters it at the same point. The Michigan Central right of way extends east and west past this point of intersection of said three streets. One hundred and fifty feet north of the north line of appellant's property on Collins street is the south line of Van Buren street, which runs parallel with Jefferson street. Prior to the passage of the traffic elevation ordinance the right of way of the Rock Island Company paralleled the right of way of the Michigan Central Company, and was about two blocks north of it on Collins street. The Rock

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Island Company abandoned the use of that right of way on Collins street and operated its trains, as before stated, over the elevated right of way of the Michigan Central Company. Formerly the direct access to appellant's factory was, as now, from Collins street only, leading north connecting with Van Buren street and south connecting with Jefferson and Washington streets. Access from the north is in no way disturbed. The elevation of the tracks narrowed Jefferson street to a width of thirty feet where it connects with Collins street, but that space allows free passage of vehicles so that there is no material interruption of travel from Collins street south to and on Jefferson street. But the change in Collins street requires vehicles from south of the improvement to go about two blocks further to reach appellant's property than was before necessary. The territory south of this point of interruption on Collins street is thickly populated, and the evidence shows that this change of route for vehicles approaching from the south has materially decreased traffic by vehicles past appellant's property on Collins street. The market value of urban business properties much depends upon the amount of travel by the premises. The location of other properties or public improvements, the improvement or nonimprovement of streets leading to and by a property, each and all tend to increase or decrease travel and thereby increase or decrease the desirability and market value of premises. As a rule the owner of property abutting on a public street has no legal ground for complaint if travel is diverted from his premises because of the vacation of a street at some distance therefrom, or because of the suspension or removal of some business, public or private, that drew travel in his direction. Our Supreme Court in *Illinois Malleable Iron Co. v. Lincoln Park Com'rs*, 263 Ill. 446, quotes with approval from Elliott on Roads and Streets (vol. 2, 3rd Ed., sec. 1181) as follows: "Owners of land abutting upon neighboring

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streets, or upon other parts of the same street, at least when beyond the next cross-street, are not, however, entitled to damages, notwithstanding the value of their lands may be lessened by its vacation or discontinuance.”

In *City of Chicago v. Union Building Ass'n*, 102 Ill. 379, on page 393, the court quotes with approval from American Law Register as follows: “For any act obstructing a public and common right, no private action will lie for damages of the same *kind* as those sustained by the general public, although in a much greater degree than any other person;” and again quotes from *McCarthy v. Metropolitan Board of Works*, L. R. 7 C. P. 508, to the effect that there arises a claim of compensation for a physical interference with a right which an owner of a house is entitled by law to make use of in connection with the house, unless the right is one which the owner possesses in common with the public, in which case there must be something peculiar to the right in its connection with the house to distinguish it from that which is enjoyed by the rest of the world. Appellees’ counsel undertake to distinguish between interference with access and interference with ingress and egress, but the courts use the terms interchangeably, and it is true that municipal authorities in making authorized improvements in streets cannot, without compensation, interfere with a property owner’s access to his property from or by way of the street, or with his ingress and egress from and to the street. It is said in *Illinois Malleable Iron Co. v. Lincoln Park Com’rs*, *supra*, on page 451, citing several Illinois cases, that: “Owners of property bordering upon a street have, as an incident of their ownership, a right of access by way of the streets which cannot be taken away or materially impaired without compensation.”

The difficulty lies in exactly defining this right of access. That it cannot be confined to the immediate



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access from the street on which the premises abut is clear on the authority of *Rigney v. City of Chicago*, 102 Ill. 64, where an injury from constructing a viaduct along Halsted street and across Kinzie street in Chicago, about 220 feet west of the property owner's premises fronting on Kinzie street, cutting off communication with Halsted street by way of Kinzie street, was held to give a right of action. That it cannot be extended to interference with an abutting owner's access to his property by vacating or obstructing a street two or three blocks away is equally clear from the authority of *City of Chicago v. Union Building Ass'n*, *supra*, which case was decided at the same term of court, and in which it was held that the closing of LaSalle street in Chicago by the Board of Trade building, three and a half blocks from the owner's abutting property, did not give a right of action because the owner was not specifically or particularly injured, and while it was true that persons passing from the owner's property to Washington street to VanBuren street or to the depot to the south would have to go further than they otherwise would, that it was the same kind of injury that will result to every one wherever located having to pass that route. It is said in that case that it must appear that the owner "has sustained a special damage with respect to his property in excess of that sustained by the public generally." A similar use of the word "excess" is found in other cases, and has given rise to contention that a right of action may be based alone on the proposition that the plaintiff's damages exceed those of others and the general public. But there is no significance in the fact of excess of damages if they are of the same kind as those sustained by the general public. This is made clear by the court in *Village of Winnetka v. Clifford*, 201 Ill. 475, where earlier authorities are cited; but that case holds on the authority of the *Rigney* case, *supra*, that the closing of a street, turning it into a blind court in front of the



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abutting owner's property, is an injury distinct from that suffered by the public. *City of East St. Louis v. O'Flynn*, 119 Ill. 200; *Parker v. Catholic Bishop of Chicago*, 146 Ill. 158; *Guttery v. Glenn*, 201 Ill. 275; and *Saunders v. City of Chicago*, 212 Ill. 206, are among other cases illustrating the rule that damage sustained by an abutting property owner, from the vacation of a street or alley, of the same kind and character sustained by the general public, differing only in degree, gives no right of action. It is *damnum absque injuria*. If there had been an obstruction south of appellant's property, turning Collins street in front of appellant's premises into a blind court and cutting off access from the south, appellant would have thereby sustained an injury of different kind from that sustained by the public under the authority of the *Rigney* case, *supra*. If the obstruction had been 100 feet further south, leaving appellant uninterrupted egress at the south from Collins street to Washington street, as well as Jefferson street, it would have no right of action under the authority of the *Union Building Ass'n* case, *supra*, and later cases above cited, although the change in the street might have very materially lessened travel on Collins street passing appellant's premises. Collins street is not turned into a blind court. Appellant still has free access not only to and from the street abutting its property and to the north, but also from that street directly south for foot passengers and directly south for vehicles excepting they must travel about two blocks further than heretofore. The inconvenience suffered by appellant in being compelled to travel this additional distance to reach that part of the city lying south of the improvement is of the same kind and character that is suffered by all people who desire to travel with vehicles in that direction, differing only in degree. The injury falls within the rule announced in the *Union Building Ass'n* case, *supra*, and not within the rule announced in the *Rigney* case,

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*supra*, and therefore though the market value of appellant's property may have been diminished by the change in Collins street, no legal cause of action accrued therefrom.

We are of the opinion that the injuries complained of other than the obstruction of Collins street arise solely and only from the legitimate and proper operation of the railroads on the right of way adjacent to appellant's premises. There is no physical interference with the *corpus* of appellant's property. Light and air may be appreciably obstructed by the raising of the embankment as it would have been by the erection of a building on the land had it been owned by a private owner, and there may be an increase in noise and dust and confusion as there might be from a legitimate business of a private owner on adjacent premises. There may be a decrease in market value of appellant's premises because of the use that the railroad company is making of its premises. All urban properties are subject to increase and decrease in market value because of uses legitimately made by other nearby owners of their land. They are only required to pay for increased value and not permitted to recover for decreased value so occasioned. Appellant acquired its property after the railroad company acquired and devoted to railroad purposes its right of way. Appellant no doubt purchased its property so located because of certain advantages arising from its proximity to the railroad, advantages absolutely necessary to the conduct of a manufacturing business. It must be presumed to have acquired its property with a view not only to those advantages but also to all disadvantages that might arise in the legitimate use of the right of way for railroad purposes. It had before the improvement a connection by means of a switch track with the railroad, and it is not claimed that this connection has been materially changed or disturbed by the improvement. We hold on the authority of *Galt v. Chicago &*

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*N. W. Ry. Co.*, 157 Ill. 125, and *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, and authorities in those cases cited and discussed, that appellant has no legal grounds for complaint because of anything proven in regard to the operation of the road.

The trial court, therefore, did not err in directing a judgment of not guilty, and the judgment is affirmed.

*Affirmed.*

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**First National Bank of Rock Falls, Appellant, v.  
George Deneen, Appellee.**

**Gen. No. 6,087. (Not to be reported in full.)**

Appeal from the Circuit Court of McHenry county; the Hon. CHARLES H. DONNELLY, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed November 5, 1915.

**Statement of the Case.**

Action by the First National Bank of Rock Falls, plaintiff, against George Deneen, defendant, in the Circuit Court of McHenry county. Plaintiff obtained a judgment against defendant by confession, on a *narr* and *cognovit*, and execution issued thereon. At the same term defendant filed a motion supported by affidavit to set aside and vacate the judgment and for leave to plead. On the motion, without formal notice to plaintiff, the court entered an order staying the execution and giving defendant leave to plead. The court overruled a demurrer to the pleas filed, and plaintiff electing to stand by its demurrer, entered an order vacating and setting aside the judgment and entered judgment in bar. From a judgment in bar, plaintiff appeals.

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J. E. BARBER and D. T. SMILEY, for appellant, McMILLEN & McMILLEN, of counsel.

EDWARD D. SHURTLEFF, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

### Abstract of the Decision.

1. JUDGMENT, § 82\*—*when showing sufficient to set aside judgment by confession.* On a motion supported by an affidavit to set aside a judgment obtained by confession on a *narr* and *cognovit*, and for leave to plead, *held* that the showing made by defendant was sufficient to sustain an order staying the execution, and granting such leave.

2. JUDGMENT, § 78\*—*when court right to open judgment and allow defendant to plead without notice.* The right of a court to make an order staying an execution on a judgment by confession and granting defendant leave to plead does not depend upon notice to plaintiff.

3. NOTICE, § 62\*—*when party compelled to take notice of court proceedings.* A plaintiff who appears for the purpose of having judgment entered by confession is properly in court and is compelled to take notice of all subsequent proceedings in relation thereto.

4. JUDGMENT, § 78\*—*when immaterial that plaintiff had no formal notice of order staying execution and granting right to plead.* Where an order is entered, staying an execution and granting defendant leave to plead, it is immaterial that plaintiff had no formal notice of such action by the court, where it appears that after the pleas were filed plaintiff actually took notice of such action by making a motion to strike the pleas, and to vacate and set aside the order, and raised all the questions it could have raised if it had had notice of the motion for leave to plead, it thereby appearing that plaintiff lost no rights by such want of notice.

5. PLEADING, § 312\*—*when verification of plea not necessary.* Section 55 of the Practice Act (J. & A. ¶ 8592), does not require verification of pleas filed in pursuance of an order staying an execution and granting leave to plead, since such statute applies only where plaintiff files with his declaration an "affidavit showing the nature of his demand, and the amount due him from the defendant, after allowing to the defendant all his just credits, deductions and set-offs, if any," and has no application to a case where the only affidavit filed with the declaration is the one usually filed in cases of

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\*See Illinois Notes Digest, Vols. XI to XV. and Cumulative Quarterly, same topic and section number.

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judgment by confession, in an action to recover on a note, verifying the handwriting and the genuineness of the signature of the maker of the note.

6. PLEADING, § 215\*—*what questions demurrer to special pleas raises.* A demurrer to special pleas raises the question of the sufficiency of the pleas as a defense to the action.

7. PLEADING, § 102\*—*when not necessary that all special pleas in bar be sufficient.* In order to support a judgment in bar, entered on special pleas, it is sufficient if any of the pleas filed contained matters constituting a bar to the action, for which reason it is not necessary in such case to find that all the pleas were sufficient in law to constitute a defense, or to bar plaintiff's action.

8. PLEADING, § 200\*—*what demurrer admits.* A demurrer admits as matter of law that the matters set up in the pleading demurred to are true, and such matters must be so regarded by the court in passing on the demurrer.

9. BILLS AND NOTES, § 348\*—*when special plea in bar sufficient.* In an action to recover on a note, a judgment in bar *held* not erroneous, where on demurrer to defendant's plea in bar it appeared that such plea alleged matter constituting a sufficient and complete defense to the action.

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## **R. S. Wall, Appellee, v. Elgin, Joliet & Eastern Railway Company, Appellant.**

**Gen. No. 6,116. (Not to be reported in full.)**

Appeal from the Circuit Court of Lake county; the Hon. CHARLES H. DONNELLY, Judge, presiding. Heard in this court at the October term, 1915. Reversed with finding of facts. Opinion filed November 5, 1915. Finding of facts modified and rehearing denied December 8, 1915.

### **Statement of the Case.**

Action by R. S. Wall, plaintiff, against the Elgin, Joliet & Eastern Railway Company, defendant, in the Circuit Court of Lake county, to recover for personal injuries sustained by plaintiff, a switchman, in jump-

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ing off a car, whereby plaintiff was ruptured. From a judgment for plaintiff for \$3,500, defendant appeals.

The declaration alleges that the defendant is a common carrier, and on the 28th day of March, 1914, was engaged in interstate commerce at Gary, Indiana; and that at that time and place, the plaintiff, while in the defendant's employ as switchman, was at work, as such switchman, in the nighttime, and in the dark, in switching certain cars which were being used by defendant in carrying interstate commerce.

According to the testimony of plaintiff, he was working in defendant's switch yards at Gary on March 27, 1914, and was engaged in the work of classifying freight trains. The work of grouping the cars together is done in the switch yards, and on certain side tracks and stub tracks, and the tracks leading to them. On the night in question plaintiff was assisting as switchman, in the work of classifying such cars; and while so engaged was riding on a so-called gondola freight car, that had been kicked onto a track which was called a pocket track. It was his particular business at this time to stop this car, by setting the brake and then jump off. The brake was located on a platform on the rear of the car, about on a level with the floor of the car, and about four feet from the ground. The brake on the car in question was out of order; the gravity dog had dropped out of the ratchet so that the ratchet would not hold; and it was therefore, necessary for plaintiff to keep hold of the tightening brake, and bring the car to a stop; and he was thereby on the car longer than if the brake had been in order; but he had about stopped the movement of the car, and was ready to get off when he noticed another car, about fifteen feet away, coming towards the car on which he was riding, and fearing a collision, walked across to the opposite side, and jumped off of the platform to the ground. In jumping off, he struck the ground "stiff legged," thereby causing more jar than would be ordi-

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narily experienced from such a jump. A few minutes after he had jumped, he felt a ticklish pain through his groin, which indicated that he had been ruptured by the jump.

The only apparent effect of the impending collision, on plaintiff's jumping, was to cause him to jump off on the opposite side; but the ground on that side was just as level and not any further from the platform of the car.

W. C. UPTON and KNAPP & CAMPBELL, for appellant,  
WILLIAM BEYE, of counsel.

CHARLES P. MOLTHROP, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

### Abstract of the Decision.

1. MASTER AND SERVANT, § 312\*—*what are dangers incident to nature of work of switchman.* In an action by a switchman under the Federal Employers' Liability Act to recover for personal injuries sustained by jumping off a platform car to the ground in a railroad freight yard, a distance of four feet, in order to avoid an impending collision with another car also being switched, where it appeared that plaintiff was ruptured as a result of striking the ground "stiff-legged" when he jumped, plaintiff's act in jumping *held* an ordinary and usual incident in his employment, the "stiff-leggedness" of the jump not being caused by the impending collision, and there being nothing unusual in such a collision when cars were being switched, so that it was obviously necessary for plaintiff to jump off such cars to avoid such collisions.

2. MASTER AND SERVANT, § 312\*—*when servant assumes risks.* A servant assumes the risks, hazards and dangers which are ordinary and usual incidents to the employment of such servant, and the master is not liable for injuries resulting therefrom.

3. MASTER AND SERVANT, § 302a\*—*when defense of assumption of risks available under Federal Act.* The Federal Liability Act of 1906 does not abolish the defense of assumption of risk by the servant in actions where the injury sought to be recovered for does not arise from the want of or a defect in an appliance with which

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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such act requires cars moving in interstate commerce to be equipped.

4. **MASTER AND SERVANT, § 302a\***—*when switchman jumping to ground to avoid collision assumes risk under Federal Act.* In an action by a switchman under the Federal Employers' Liability Act to recover for personal injuries sustained by jumping off a platform car to the ground, a distance of four feet, to avoid an impending collision in a railroad freight yard between such car and another car which was also being switched, *held* that plaintiff assumed the risk.

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**County of Lake, Appellee, v. Carl P. Westerfield,  
Appellant.**

**Gen. No. 6,138.**

1. **OFFICERS, § 52\***—*what is nature of liability for interest on public moneys.* The decisions which hold that in the absence of a controlling statute public officers are entitled to the interest collected on public moneys in their hands and are not obliged to account therefor are based mainly on the consideration that an absolute liability is imposed on the officer for the payment of the principal sums collected by him, in which case it is said that he is not merely the custodian or bailee thereof, and does not assume the liability of a trustee in regard to such moneys.

2. **COUNTIES, § 49\***—*what is nature of liability of county treasurer for interest on public funds.* A county treasurer is an absolute insurer of the fund coming to his hands in the sense that he cannot excuse a failure to pay it over on grounds which would excuse a trustee for such failure.

3. **COUNTIES, § 49\***—*why funds held by county treasurer should not be regarded as private property.* Hurd's Rev. St., ch. 36, sec. 4 (J. & A. ¶ 2908), providing that a county treasurer shall receive and *safely keep* all revenues and funds authorized by law to be paid to him, and disburse the same pursuant to law, and section 81 of the Criminal Code (J. & A. ¶ 3625), making it a penal offense for a country treasurer for his own use to loan any of the money intrusted to him, forbid the conclusion that such funds should be regarded as the private property of the officer.

4. **OFFICERS, § 52\***—*when interest money in hands of officer in official capacity.* Interest received by a public officer on funds deposited in banks by him in his official capacity is an increment to such funds, hence the right to such interest is vested in the public,

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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and on its receipt by the office such interest becomes money in his hands in his official capacity.

5. **COUNTIES, § 49\***—*how liability of county treasurer for interest determined.* The disposition of interest received by a county treasurer on deposits of public money in his hands in his official capacity is controlled by section 10 of article X, of the Constitution, providing that all fees or allowances received by a public officer in excess of the amounts allowed to such officer by the county board shall be paid into the county treasurer, and by section 52 of the Fees and Salaries Act (J. & A. § 5654), requiring that all fees, perquisites and emoluments received by county officers of the certain classes in excess of the amounts allowed to such officers by the county board shall be paid into the county treasury.

6. **OFFICERS, § 62\***—*what constitutes fees, perquisites and emoluments.* The words "fees, perquisites and emoluments," used in section 52 of the Fees and Salaries Act (J. & A. § 5654), are sufficiently comprehensive to include every payment to a public officer in his official capacity.

7. **CONTRIBUTION, § 1\***—*when doctrine of compelling contribution among wrongdoers inapplicable.* The cases which hold the sureties on the bond of a public officer are not entitled to indemnity from their principal as being involved in a contract to perform an illegal and criminal act, the law not compelling contribution among wrongdoers, or enforcing illegal contracts, have no application to an action by an innocent plaintiff against a defendant who is charged with an illegal act.

8. **COUNTIES, § 49\***—*when county treasurer must pay fees into county treasury.* Full force and effect must be given to the requirements of section 52 of the Fees and Salaries Act (J. & A. § 5654), requiring that all fees, perquisites and emoluments received by county officers of certain classes in excess of the amounts allowed to such officers by the county board must be paid into the county treasury, as is shown by the construction given to the statute by the Supreme Court, holding that fees received by clerks of Circuit Courts in naturalization cases under the Federal Act of 1908 are fees of the office, which under the statute must be paid into the county treasury.

9. **COUNTIES, § 49\***—*how Fees and Salaries Act construed relative to collection of and accounting for interest by county officers.* Although section 12 of the Cities, Towns and Villages Act (J. & A. § 2061) in express terms requires the treasurer of a sanitary district to collect and account for interest on public moneys deposited by him in banks, and while section 52 of the Fees and Salaries Act (J. & A. § 5654) does not in terms require county officers so to

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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collect and account, yet this consideration is not controlling of the construction of the latter statute so as to require an inference that the Legislature therein intended to recognize the right of the county officer to retain interest received on public funds, or as authorizing or acquiescing in a misappropriation of public funds in the absence of express statutory provisions, section 12 merely requiring the collection and accounting for such interest, where without such provision such officer would not be required to collect interest.

10. OFFICERS, § 62\*—*what is custom among public officers regarding interest on public funds.* It is common knowledge that there is a long established custom by which public officers collect and appropriate to their own use interest received on public funds, with the knowledge and acquiescence of every one.

11. STATUTES, § 194\*—*when existence of custom inconsistent with statute disregarded.* If the meaning of a statute is clear and unambiguous, a practical construction by long established custom which is inconsistent with such meaning will have no weight and will not be followed.

12. COUNTIES, § 44\*—*what constitutes a perquisite within Fees and Salaries Act.* Interest received by a county treasurer on deposits of public money is a "perquisite" within the meaning of section 52 of the Fees and Salaries Act (J. & A. § 5654), requiring that all fees, perquisites and emoluments received by public officers of certain classes in excess of the amounts allowed to such officers by the county board be paid into the county treasury.

13. COUNTIES, § 44\*—*Fees and Salaries Act not ambiguous.* Section 52 of the Fees and Salaries Act (J. & A. § 5654), requiring that all fees, perquisites and emoluments received by county officers of certain classes in excess of the amounts allowed to such officers by the county board be paid into the country treasury, *held* not ambiguous so as to require or admit the aid of contemporaneous construction by which county treasurers are allowed to retain for their own use interest received by them from deposits of money in their hands in their official capacity.

14. OFFICERS, § 62\*—*when officer retaining public funds not guilty of bad faith.* The long continued and improper practice of public officers in retaining public funds in their hands, claiming them as their own, leads to the conclusion that one so doing is acting honestly and is not guilty of bad faith in following the custom of his predecessors.

15. ESTOPPEL, § 93\*—*when estoppel inapplicable to State.* Since the State cannot be estopped by laches from claiming its own, the actual ownership of money required by statute to be paid into the public treasury cannot be permitted to be controlled by the con-

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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sideration that there exists a long continued and improper practice of officers in retaining such funds in their hands, claiming such funds as their own.

16. COUNTIES, § 49\*—*what is nature of liability of county treasurer failing to pay into county treasury interest received on public funds.* Although interest received by a county treasurer on public funds in his hands in his official capacity be so received from various funds other than the county tax, yet, it being his duty to pay such interest into the county treasury, he is a wrongdoer if he fails so to pay such interest, and stands in the same legal attitude as though he took and appropriated to his own use any other money from the treasury.

17. COUNTIES, § 49\*—*when fact that money abstracted by county treasurer is taxes belonging to another municipality no defense.* A county treasurer cannot defend an action brought by the county for wrongfully abstracting money from the county treasury on the ground that the particular money abstracted was received from taxes levied by another municipality and was ultimately to be paid to such municipality.

Appeal from the Circuit Court of Lake county; the Hon. CLAIR C. EDWARDS, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed November 18, 1915.

A. F. BEAUBIEN and FRANK L. SHEPARD, for appellant.

R. J. DADY and E. M. RUNYARD, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Carl P. Westerfield was, from December 5, 1910, to the beginning of this suit, county treasurer and *ex officio* county collector of the county of Lake, and received and collected from certain banks \$7,343.90 as interest or compensation for the deposit with or use by such banks of public funds and moneys that had from time to time come into his hands as such officer, and converted such money so received to his own use, claiming it as his own. This action of assumpsit was brought against him as an individual by the appellee, County of Lake, to recover that money, and on a trial

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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before the court without a jury, it being admitted that he had so received that sum, judgment was rendered against him for that amount, from which judgment this appeal is prosecuted.

It was also admitted on the trial that appellant was not entitled to the money on account of salary, clerk hire or other necessary expenses; that the county had demanded the money of him, and he had refused to account for it and turn it over on the ground that it was not an earning of his office, but his own private property. The questions presented and argued here are whether a county treasurer is required to account moneys coming to his hands, and if he is liable to account for such interest, whether to the county or to the various taxing municipalities from which he derived the fund on which such interest was received. It is not questioned that this suit is properly brought against him as an individual if he is liable to account to the county for the amount claimed.

One inquiry is whether public officers in the absence of a controlling statute are entitled to interest collected on public funds in their hands. Counsel for appellant say there is a conflict of authority, and cite: "*Shelton v. State*, 53 Ind. 331, 21 Am. Rep. 197; *State v. Walsen*, 17 Colo. 170, 28 Pac. 1119, 15 L. R. A. 456; *Renfroe v. Colquitt*, 74 Ga. 618; *Commonwealth v. Godshaw*, 92 Ky. 435, 17 S. W. 737; *Maloy v. County Commissioners*, 10 N. M. 638, 62 Pac. 1106, 52 L. R. A. 126," holding that the officer is not liable to account for such interest. But they correctly say that these decisions rest mainly on the consideration that an absolute liability is imposed upon the officer for the payment of the principal sum; that it is not a case of bailment and he does not assume the liability of a trustee or agent that is merely the bailee or custodian of the money in his hands. In *Shelton v. State*, *supra*, it is expressly held that "The money which he receives becomes his own money." Counsel cite *Thompson v. Board of Trustees*, 30 Ill.

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99; *Town of Cicero v. Hall*, 240 Ill. 160; and *Town of Cicero v. Grisko*, 240 Ill. 220, in support of their contention that the public officer is, in this State, not regarded as a bailee or trustee of the fund, and therefore they say the conclusion of the courts of other States, based on that consideration, should be here adopted. It is true that in this State the county treasurer is, in a sense, an absolute insurer of the fund coming to his hands, and cannot excuse a failure to pay it over on grounds that would be available to a trustee of a fund.

But under our statutes the fund should not be regarded as the private property of the officer. It is provided in section 4 of chapter 36 of the Illinois Statutes (J. & A. ¶ 2908), that the county treasurer shall receive and *safely keep* all revenues and other public moneys of the county, and all moneys and funds authorized by law to be paid to him, and disburse the same pursuant to law, and section 81 of our Criminal Code (J. & A. ¶ 3625), makes it a penal offense for a county treasurer to loan for his own use, with interest, any portion of the money intrusted to him for safe-keeping, disbursement, transfer or other purpose. These two statutes forbid the conclusion that the fund is the private property of the officer. We are not aware that any such doctrine has ever been held in this State. That the title to public funds is not in their keepers was assumed as a matter of course in *Dreyer v. People*, 176 Ill. 590. It is true that in *State v. Walsen*, *supra*, the Supreme Court of Colorado placed its denial of liability of the officer for interest received in part on other grounds; but the reasoning of that case is not in harmony with our decisions, and that much of it is not in accordance with the general current of authorities is pointed out in *State v. McPetridge*, 84 Wis. 473 (20 L. R. A. 223), a case in which the authorities are very thoroughly reviewed, and in which *Hughes v. People*, 82 Ill. 78; *Cooper v. People*,

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85 Ill. 417; and *City of Chicago v. Gage*, 95 Ill. 593, are relied on, among other cases, in support of the doctrine that the interest on deposits of public funds is an increment to the funds of the State deposited by the officer in banks in his official capacity, and therefore the right to such interest is vested in the State, and on receipt thereof by the officer it becomes money in his hands belonging to his office.

But apart from the consideration whether interest so received is an increment of the fund, we have controlling constitutional and statutory provisions as to its disposition. Section 10 of article X of our Constitution provides that the county board shall fix the compensation of all county officers with the amount of their necessary clerk hire, stationery, fuel and other expenses, and in all cases where fees are provided for, said compensation shall be paid only out of the fees actually collected, and that all fees or allowances by them received in excess of their said compensation shall be paid into the county treasury. It is provided in section 52 of our Fees and Salaries Act (chapter 53, Revised Statutes, J. & A. ¶ 5654) that all fees, perquisites and emoluments received by said county officers in counties of the first and second class (above the amount of their compensation fixed by the county boards and for clerk hire and other necessary expenses) shall be paid into the county treasury. If this item of interest received by appellant was a perquisite or emolument of his office, as county treasurer, it should have been paid into the county treasury. In *Hughes v. People*, *supra*, the question arose whether interest received on deposits made by the county collector of county funds belonged to him or the county, and it seems to have been considered beyond question that interest so received was a perquisite or emolument of his office, and "Being a perquisite or emolument acquired by official position should be accounted for to the county." The court in *People v. Foster*, 133 Ill.



496, on page 519, in discussing the term “perquisites,” said that the Legislature in using that term along with the words “fees and emoluments” used language so comprehensive as to include every payment to an officer which comes to him as such officer.

There is a line of authorities referred to in *State v. McFetridge, supra*, holding that sureties on an official bond are not liable for interest on public moneys where the officer violated a criminal statute in receiving such interest. It was held in *Estate of Ramsay v. Whitbeck*, 183 Ill. 550, that sureties were not entitled to indemnity from their principal because they were involved in a contract with him to perform an illegal and criminal act, on the long established principle that the law will not compel contribution among wrongdoers, and will not aid in the enforcement of an illegal contract. But we see no application of those decisions to this case. This is a suit against the individual, charged with the illegal act by a plaintiff, that is entirely innocent. The late case of *People v. Witzeman*, 268 Ill. 508, is instructive in construing the statute requiring fees, perquisites and emoluments received by a public officer, above his salary, to be paid into the county treasury, and its reasoning in holding that fees in naturalization cases, under the Federal Act of 1906, retained by the clerks of the Circuit Court, are fees of the office and must be accounted for and paid over to the county, indicates that full force and effect should be given to that statutory requirement.

It is argued that a long established custom of public officers to collect and appropriate to their own use interest received on public funds, with the knowledge and acquiescence of everybody, amounts to a practical construction of these constitutional and statutory provisions, and our attention is called to the fact that in *Dreyer v. People, supra*, such custom was said to be a matter of common knowledge. The same consideration was urged on the court in *Whittemore v. People*, 227

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County of Lake v. Westerfield. 196 Ill. App. 432.

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Ill. 453, and the authorities on contemporaneous construction are there reviewed. The substance of the authorities expressed in varying language is, if the meaning of a statute is clear and unambiguous, a practical construction inconsistent with that meaning will have no weight and will not be followed. If, in the instant case, the interest received by appellant was a perquisite of his office, and it is decided that it is, there is nothing in this statute to construe more than if it had, in express terms, required that interest received by county treasurers on public funds deposited by them should be paid into the county treasury. We do not think there is any ambiguity about the statute requiring or admitting the aid of contemporaneous construction.

Our attention is called to the Statute of 1893, repealed in 1897, providing that treasurers and other custodians of public funds deposited in banks shall account for interest thereon at a rate of not less than two per cent. per annum, and that three-fourths of such interest shall belong to the public and be added to the fund, and the remaining one-fourth shall remain to such officer or custodian. Also to our present Cities, Villages and Towns Act (Hurd's Statutes ¶ 732, J. & A. ¶ 2061), providing that the treasurer of the sanitary district shall, when the moneys of the district are deposited with a bank, require the bank to pay the same rate of interest that it is accustomed to pay to depositors under like circumstances in the usual course of its business, and that the interest so paid shall be placed in the general funds of the district, and it is argued from these provisions that the Legislature has recognized and does recognize the right of the public officer to retain interest received on public funds in the absence of such statutory provisions. We do not think this consideration controlling. The existing sanitary district statute has some force in requiring the officer to collect interest on public funds, which, in

the absence of the statute, he would be under no obligation to do. But we do not see that the fact that the Legislature undertook in this way to increase the funds of the sanitary district should be construed as authorizing or acquiescing in a misappropriation of public funds in the absence of such a statute. The consideration of the long-continued, improper practice of officers in retaining public funds in their hands, claiming them as their own, leads to the conclusion that one so doing is acting honestly and is guilty of no bad faith in following the custom of his predecessors. But to permit such consideration to control the actual ownership of the money would be to estop the State on the doctrine of laches from claiming its own, which is not permissible.

It is insisted if the interest collected by appellant does not belong to him, it is an accretion of the various funds in his hands, and the county would have no right to recover a greater amount than the interest on the fund derived from the county tax. We see no force in this contention. If this interest belonged in the county treasury and it was the duty of appellant to place it there, he was, in legal contemplation, a wrongdoer, and while under the circumstances moral turpitude is not imputed, still he stands in the same legal attitude that he would if he had taken any other money out of the county treasury and appropriated it to his own use. It would be absurd to say that a county treasurer could defend a suit brought by the county for wrongfully abstracting money from the county treasury on the ground that the particular money, so abstracted, was received from taxes levied by some other municipality and was ultimately to be paid by him to such other municipality. We are of the opinion that under the admitted facts the judgment is right, and therefore it is affirmed.

*Judgment affirmed.*

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The People v. Sehrer, 196 Ill. App. 442.

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**The People of the State of Illinois, Defendant in Error,  
v. August Sehrer, Plaintiff in Error.**

**Gen. No. 6,155.**

1. WITNESSES, § 267\*—*when credibility of detective for jury.* The testimony of a detective is to be treated like the testimony of any other witness, and his interest, if any, in securing compensation from and success for the side employing him is deemed the same as that of any other witness, and the jury are the judges of the credibility of such testimony.

2. WITNESSES, § 314\*—*when credibility of accused for jury.* A defendant in a criminal case is an interested witness when testifying in his own behalf, and the credibility of his testimony is a matter to be determined by the jury.

3. WITNESSES, § 261\*—*what may be effect of demeanor of witnesses upon jury.* As between interested witnesses in a criminal case whose testimony is conflicting, the demeanor of the witnesses may have led the jury to place confidence in the truth of the testimony of those on one side of the case and to discredit those on the other.

4. INTOXICATING LIQUORS, § 130\*—*when presumed saloon keeper tempted to violate law.* A person who keeps a barroom open on Sunday to sell soft drinks would obviously be tempted to sell intoxicating liquor, if opportunity offered.

5. INTOXICATING LIQUORS, § 148\*—*when evidence sufficient to sustain conviction.* In a prosecution in which defendant was charged with keeping open a tippling house on Sunday, where the jury believed the testimony of certain detectives who testified that defendant sold them lager beer, and discredited defendant's evidence that the liquor sold was "near beer," evidence *held* to justify a judgment of conviction.

Error to the County Court of Lake county; the Hon. PERRY L. PERSONS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed December 8, 1915.

GEORGE W. FIELD, for plaintiff in error.

R. J. DADY and E. M. RUNYARD, for defendant in error.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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The People v. Sehrer, 196 Ill. App. 442.

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August Sehrer was found guilty in the County Court of Lake county under two counts of an information which charged him with keeping open a tippling house on Sunday, and was fined one hundred and fifty dollars under each of said counts and brings the record here for review. It is not argued that the court committed any error, except in refusing to grant a new trial. The sole contention is that the evidence is not sufficient to support the verdict.

At the time in question Sehrer kept a dramshop in the Village of Fox Lake in Lake county, and was running a summer resort in connection therewith. His bar was kept open on Sunday for the sale of temperance drinks, near beer and cigars, at least. A detective testified that he went into Sehrer's barroom on Sunday, August 30, 1914, and called for drinks; that Sehrer required him to sign a paper, dated a day ahead, which he did, and Sehrer then served him lager beer for which he paid. Two detectives testified that on the following Sunday, September 6th, they bought and paid a man behind the bar for lager beer, which was served them, and that defendant was present. They testified that on the following Sunday, September 13th, they were in the same place and ordered a drink of defendant and he refused to sell to them and that another man in the barroom said, in the presence of defendant, that he had bought up some liquor to be delivered on Sunday and that they could have some of his, and that the liquor was served and that no money was then exchanged; that a few minutes later, they had another bottle of lager beer, for which the stranger paid the defendant over the bar. Defendant denied selling lager beer to these witnesses on any of said Sundays, but admitted that they were in his place of business and he sold them "near beer."

It is contended that the witnesses for the People should not be believed because they were detectives, and reliance is had upon language in the opinion in

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The People v. Sehrer, 196 Ill. App. 442.

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*Blake v. Blake*, 70 Ill. 618. That language had the sanction of only three of the seven judges. Three judges dissented entirely, and expressly dissented from the language concerning detectives. Another judge concurred in the conclusion only in that case, which was affirming a decree against complainant in a suit for divorce. This court disapproved an instruction intended to discredit detectives in *People v. Gardt*, 175 Ill. App. 80, and this was approved and affirmed in 258 Ill. 468. The true rule we conceive to be that the testimony of a detective is to be treated like the testimony of any other witness, and his interest, if any, in securing compensation from and success for the side which employs him is to be considered the same as the interest of any other witness, and the jury are the judges whether he shall be believed. The defendant also was interested, and the credit to be given his testimony was a matter to be determined by the jury. The jury believed the detectives and disbelieved the defendant. The trial judge approved that conclusion. There may have been that in the demeanor of the detectives on the stand which gave the jury confidence in the truth of their testimony. Obviously defendant, who was keeping his barroom open on Sunday with his usual servants to sell soft drinks, would be subject to a temptation to sell intoxicating liquor, if the opportunity offered. The jury and the trial judge may have seen that in the demeanor of the defendant on the stand which led them to believe that he had yielded to that temptation. It is impossible that we should say that the jury should have believed the defendant and should have disbelieved the People's witnesses. The evidence for the People, if believed, justified a conviction. *People v. McCann*, 247 Ill. 130; *People v. Conners*, 246 Ill. 9; *People v. Horchler*, 231 Ill. 566. The judgment is therefore affirmed.

*Affirmed.*

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The People v. Clayton, 196 Ill. App. 445.

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**The People of the State of Illinois, Defendant in Error,  
v. Peter Clayton, Plaintiff in Error.**

**Gen. No. 6,156. (Not to be reported in full.)**

Error to the County Court of Lake county; the Hon. PERRY L. PERSONS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed December 8, 1915.

**Statement of the Case.**

Prosecution by the People of the State of Illinois against Peter Clayton, defendant, in the County Court of Lake county, charging defendant with keeping open a tippling house on Sunday.

This case presents similar facts to those in *People v. Sehrer*, Gen. No. 6,155, *ante*, p. 442, and the same error is assigned in this case as in that. The decision in this case is governed by the opinion filed in that case.

A. L. TOMPKINS and GEORGE W. FIELD, for plaintiff in error.

R. J. DADY and E. M. RUNYARD, for defendant in error.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

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**Gustave J. Carus, Trustee, et al., Appellees, v. F. W. Matthiessen, Jr., et al., Appellants.**

**Gen. No. 6,139.**

1. CORPORATIONS, § 153\*—*when assignment of certificate of stock by trustee valid.* Where stock stands on the books of a corporation in the individual name of one who actually holds it as trustee, a

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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transfer of the certificate by such trustee both individually and as such trustee is valid and legal.

2. **MANDAMUS**, § 98\*—*when lies to compel corporation to transfer stock.* Mandamus is a proper remedy to compel a corporation to transfer stock on its books although there may be other proper remedies.

3. **MANDAMUS**, § 3\*—*when existence of other remedy not ground for denial of writ.* The reason given in other jurisdictions for denying the writ of mandamus to compel a corporation to transfer stock on its books, that the right to such transfer is a purely private right, for which an adequate remedy exists by an action at law for damages or by bill in equity to compel the transfer, is removed by section 9 of the Mandamus Act (J. & A. § 7338), providing that such writ shall not be denied where the writ will afford a proper and sufficient remedy because plaintiff may have another specific legal remedy.

Appeal from the Circuit Court of La Salle county; the Hon. EDGAR ELDREDGE, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed December 8, 1915.

**WILLIAM J. CALHOUN** and **M. F. GALLAGHER**, for appellants.

**MONTGOMERY, HART, SMITH & STEERE**, for appellees; **CHARLES S. CUTTING**, **LOUIS E. HART** and **NORMAN H. PRITCHARD**, of counsel.

**MR. JUSTICE CARNES** delivered the opinion of the court.

Mary Hegeler Carus, as an individual, assigned certificate No. 42 of stock in the Matthiessen & Hegeler Zinc Company to her son, Gustave K. Carus, as an individual, which was presented to F. W. Matthiessen, Jr., and George P. Blow, acting secretary and president of said company, with the request that it be transferred on the books of the company and a new certificate issued. The certificate stood on the books of the company in Mrs. Carus' individual name, but she held it, with other stock in the company, under trusts created by her father's will and a family settle-

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ment made after his death. The request for transfer was refused on the ground that she could not, as such trustee, make a valid conveyance of the certificate. The assignee, Gustave K. Carus, filed in the Circuit Court of LaSalle county a petition for mandamus to compel a transfer, which, on a hearing before the court without a jury, was denied on the ground that Mrs. Carus owned the certificate as trustee, and could not under the limitations of the trust make an unconditional conveyance. The petitioner appealed from this judgment and that appeal is now pending in this court (Gen. No. 6,127, *post*, p. 449). Mrs. Carus, apparently to meet the suggestion of the court, indorsed another assignment on the same certificate in which she both as an individual and as trustee assigned the stock to Gustave K. Carus as trustee, and the certificate, so indorsed, was again presented to the same parties (appellants in this case) with a request for transfer on the books of the company, which was again refused because appellants were advised and believed that under the trusts mentioned Mrs. Carus could not make a valid transfer of the certificate. This suit was then begun on the question of both Gustave K. Carus and Mary Hegeler Carus in the same court, and on a trial before the same judge without a jury the prayer of the petition was granted and a peremptory writ ordered, from which judgment this appeal is prosecuted and reversal sought on the grounds that mandamus is not a proper remedy, and, if it is, that under the trusts in question Mrs. Carus could not make a valid, legal transfer of the certificate. The case was tried on stipulated facts, and there are no other questions in dispute.

It is a part of a controversy between the Matthiessen and Hegeler families concerning the control of said corporation, which has been before us in the four suits of *People ex rel. v. Matthiessen*, 193 Ill. App. 328; *People ex rel. v. Lihme*, 193 Ill. App. 341; *People ex*

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*rel. v. Lihme*, 193 Ill. App. 357; and *People ex rel. v. Diesterweg*, 193 Ill. App. 360.

Those cases were argued together and opinions written in each case referring to the opinions in the other three cases. There has been no dispute about the facts but much dispute as to the conclusions to be drawn from them. They are set forth and discussed in detail in our former opinions, and in the opinions of the Supreme Court reported in 269 Ill. pp. 351, 499 and 602, affirming the judgments of this court. Practically the same counsel have been engaged in all these cases, and this opinion is written assuming familiarity with facts and conclusions of law stated in those opinions. The four cases decided by us were pending on appeal in the Supreme Court when the present case was argued here, and counsels' briefs are largely devoted to the discussion of questions that are now settled by the opinions of the Supreme Court since rendered.

Propositions of law were submitted to the court by the parties in the present case, requiring a holding on the question whether a proper construction of the trust permitted the transfer of the certificate, and were marked by the court held or refused in accordance with the views that we had expressed in our former opinions, the court noting on his holdings that the propositions were so held and refused because of our opinions filed in those cases. Other propositions of law were presented by appellant to the effect that mandamus is not a proper remedy to compel the transfer of a certificate of stock, but that the proper remedy is an action of damages, or bill in equity. The court marked these propositions refused.

The decisions of the Supreme Court and opinions filed therein dispose of all questions arising here as to the power of Mrs. Carus, as trustee, to make the transfer in question. The court did not err in holding that the transfer was valid and legal.

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We are also of the opinion that there is little, if any, question in this State that mandamus is a proper remedy, though it may well be that there are other proper remedies. Section 9 of our Mandamus Act (J. & A. ¶ 7338) provides that the writ shall not be denied because the petitioner may have another specific legal remedy where such writ will afford a proper and sufficient remedy. In the absence of such a statute there is a conflict of authority in other States, the writ being denied in some jurisdictions on the ground that the right is a purely private one, and there is generally an adequate remedy by an action against the corporation for damages or by a suit in equity to secure a decree ordering the transfer. (26 Cyc. 347.) That reason for denying the writ is removed by the statute. *Brokaw v. Com'rs of Highways*, 130 Ill. 482; *People v. Wells*, 255 Ill. 450. The right to the writ is recognized in *People ex rel. v. Sterling Mfg. Co.*, 82 Ill. 457; *People ex rel. v. Manf. Co.*, 99 Ill. 355, and held in *Smith v. Automatic Photographic Co.*, 118 Ill. App. 649. Therefore the judgment of the trial court should be affirmed.

*Affirmed.*

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**Gustave K. Carus, Appellant, v. Matthiessen & Hegeler  
Zinz Company et al., Appellees.**

**Gen. No. 6,127.**

1. MANDAMUS, § 98\*—*when moot question presented.* In a petition for mandamus to compel the transfer of stock by a corporation on its books, brought by one holding a certificate of the stock of such corporation by the individual assignment of one who actually held such stock as trustee, although it stood on the books of the corporation in the individual name of such trustee, where it appeared that as a result of the suggestion of the court such trustee wrote on the certificate sought to be transferred a new assignment, both

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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as an individual and as trustee, to petitioner, on which petitioner sought and obtained a writ of mandamus to compel such transfer, an appeal from the judgment denying the writ in the first case on the ground that such transferee could not make a valid conveyance of the stock as an individual, *held* to present a moot question.

2. **CORPORATIONS, § 153\***—*what constitutes an assignment of stock by a trustee.* One who appears on the books of a corporation as owning stock in her own name, but who in fact owns such stock as trustee and who first attempts to transfer such stock individually, and afterwards writes on the certificate an assignment both as an individual and as trustee, in fact transfers the stock as trustee, whatever be the form of the transaction.

3. **MANDAMUS, § 98\***—*when no power to require two transfers of same stock.* A court cannot order two peremptory writs requiring two transfers of the same stock and two certificates thereof to be issued to the transferee.

4. **MANDAMUS, § 187\***—*when validity of assignment of corporate stock not considered.* Where a transferee of a certificate of stock under one form of assignment seeks mandamus to compel the corporation issuing the stock to transfer the same on its books, and on the writ being denied, on the ground that the assignment to him is invalid, obtains another assignment, on which he seeks and obtains the writ to compel the transfer, the Appellate Court will not inquire on appeal from the denial of the writ in the first case, whether the first form of assignment was valid.

5. **MANDAMUS, § 6\***—*when necessary matter involved be substantial to justify use of remedy.* The matter involved in a mandamus proceeding must be substantial and of sufficient importance to justify the use of the remedy, and moot questions will not be determined thereby.

6. **MANDAMUS, § 6\***—*what is nature of rights necessary for granting of writ.* Unless the matter involved in a petition for mandamus be of public interest, the writ will be denied where the right sought to be enforced thereby is or will become a mere abstract right, the enforcement of which by change of circumstances can be of no practical benefit to petitioner.

Appeal from the Circuit Court of La Salle county; the Hon. EDGAR ELDRIDGE, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed December 8, 1915.

**MONTGOMERY, HART, SMITH & STEERE, for appellant;**  
**CHARLES S. CUTTING, GEORGE T. BUCKINGHAM, LOUIS E. HART and NORMAN H. PRITCHARD, of counsel.**

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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WILLIAM J. CALHOUN and M. F. GALLAGHER, for appellees.

MR. JUSTICE CARNES delivered the opinion of the court.

This mandamus proceeding is referred to in our opinion in Gen. No. 6,139, *ante*, p. 445, filed herewith. The substantial relief sought by the petition in this case has been obtained by the judgment of the court in that case. We are inclined to hold that the petitioner in this case, having obtained the transfer of the stock by an order entered in the other case, is presenting to us merely a question of abstract right. It will be seen by reference to our opinion in the other case that whatever the form of transfer of the certificate in question, it is, in fact, a transfer by a trustee to a trustee. We cannot order a peremptory writ in each case thereby requiring two transfers on the books and two certificates to issue on the same share of stock, and practically the same transaction. Counsel for appellant suggest this difficulty, and counsel for appellees answer the suggestion by saying that the transfer is only ordered on the presentation of the certificate indorsed, and therefore the supposed difficulty does not exist. Neither counsel have much discussed this question. Having determined that an assignment in the form presented in Gen. No. 6,139 must be recognized by the corporation, and affirmed the judgment so holding, we are not inclined to investigate the question whether the form of assignment adopted in this case is also sufficient. We know of no controlling authority governing the disposition of this case by us under the circumstances, but it is elementary law that the matter involved in a mandamus proceeding must be substantial and of sufficient importance to justify the use of the remedy; that abstract or moot questions will not be determined, and where the right is, or will become, a mere abstract right, the enforcement of which by

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reason of some change of circumstances can be of no substantial or practical benefit to the petitioner, mandamus will be denied, if it is not a matter of public interest. (26 Cyc. 156.) The judgment is affirmed.

*Affirmed.*

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**The People of the State of Illinois ex rel., Alex Anderson, Appellee, v. County of Lee, Appellant.**

**Gen. No. 6,164.**

1. **STATUTES, § 213\***—*when construction of previous statutes controlling in construing re-enacted statute.* Where a statute which has not been judicially construed re-enacts previous statutes with slightly but not materially different provisions, the construction given by the courts to such previous statutes will control the construction of the re-enacting statute.

2. **STATUTES, § 205\***—*when presumed Legislature had in mind re-enacted statutes and construction placed thereon by courts.* Where a statute re-enacts previous statutes with slightly but not materially different provisions, which previous statutes have received judicial construction, it must be presumed that the Legislature, in passing the re-enacting statute, had in mind the previous statutes and the construction given by the courts to such statutes.

3. **STATUTES, § 199\***—*when words of statute will not be departed from.* Where a clause in a statute providing for the enforcement of a duty is clearly limited to the duty imposed in the same section, the courts are not at liberty so to extend the effect of such clause as to make it apply to the enforcement of a different duty imposed by a different section of the same act, for the enforcement of which different duty the section imposing it does not in terms provide, although it cannot be perceived why the Legislature limited the application of such clause.

4. **ROADS AND BRIDGES, § 154\***—*when county cannot be compelled under statute to aid in construction or repair of bridges.* Following the construction given by the courts to previous statutes re-enacted with slight but not materially different provisions, by Hurd's Rev. St., ch. 121, art. V, sec. 36, providing for the construction by counties of bridges on or near county lines, *held* that the statute contains no express provision for compelling a county to aid in the construction or repair of bridges not "across any stream which is

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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the boundary line between" counties, or "within eighty rods of such boundary line, and the cost of such bridge will equal or exceed \$5,000, as to which class of bridges such statute expressly provides a method for compelling such aid.

5. **ROADS AND BRIDGES, § 154\***—*when writ of mandamus erroneously granted to compel county to aid in construction of bridges.* In a petition for mandamus to compel a county to aid in the construction of bridges on or near county lines under Hurd's Rev. St., ch. 121, art. V, sec. 36, providing that "bridges over streams which divide counties, and bridges on roads on county lines, and bridges within eighty rods of county lines, shall be built and repaired at the expense of such counties," but providing no method for the enforcement of such duty except as to bridges "across any stream which is the boundary line between" counties or "within eighty rods of such boundary line, and the cost of such bridge will equal or exceed \$5,000," *held* that the writ was erroneously granted as to seven of such bridges, and that the writ was properly denied as to two bridges.

Appeal from the Circuit Court of Lee county; the Hon. OSCAR E. HEARD, Judge, presiding. Heard in this court at the October term, 1915. Reversed in part and affirmed in part. Opinion filed December 8, 1915.

HARRY EDWARDS, for appellant.

WILLIAM J. EMERSON, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

This is a mandamus proceeding begun in the Circuit Court of Lee county, by a resident landowner and taxpayer of Ogle county to compel the county of Lee to aid in rebuilding certain bridges on public highways on the county line between Ogle and Lee counties, and on highways within eighty rods of said county line. There was a trial before the court on stipulated facts which left the decision to depend entirely on the construction of section 36 of article V of our Roads and Bridges Act. of 1913 (chapter 121, Hurd's Rev. Stat.). The first sentence of said section directs that three classes of bridges (1) over streams which divide counties (2) on roads on county lines (3) within eighty rods of

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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county lines "shall be built and repaired at the expense of such counties." The next two sentences direct that bridges of class (1) and (3) when the cost of construction shall be \$5,000, or over, shall be built by such counties in the proportion indicated, and when one county, desiring to construct such bridge, has appropriated its share of the cost of constructing the same, the other county shall make an appropriation for its share of the cost, and if it fails to do so, any court of competent jurisdiction shall issue an order compelling it to make such appropriation. Further provided as to bridges in class (3) that cost less than \$5,000 that the expense of building and maintaining shall be borne by both counties in the proportion to be fixed as there indicated, but no provision as to enforcing that liability. The section reads as follows: "Bridges over streams which divide counties, and bridges on roads on county lines, and bridges within eighty rods of county lines, shall be built and repaired at the expense of such counties. And all such bridges over streams which form the boundary line between two counties, and all such bridges within eighty rods of such boundary line, when the cost of constructing the same shall be \$5,000 or over, shall be built by such counties respectively in the proportion that the taxable property in each county respectively bears to each other according to its assessed value as equalized at the time of constructing such bridge. And when any county desires to build any such bridge across any stream which is the boundary line between such county and another county, or desires to build any such bridge within eighty rods of such boundary line, and the cost of such bridge will equal or exceed \$5,000, and the county desiring to construct such bridge has appropriated its share of the cost of constructing the same, then it shall be the duty of such other county to make an appropriation for its proportion of the cost of said bridge on the basis of the assessed value of the property, real and personal,

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of each of said counties according to the last preceding assessment thereof as equalized, and if such other county fails or refuses to make an appropriation for its proper portion of the cost of constructing such bridge, any court of competent jurisdiction shall issue an order to compel such county to make such appropriation upon a proper petition for that purpose, and the cost and expense of maintaining and keeping the same in repair after the same is built and constructed shall be borne in the proportion of the assessed value of the property in each of said counties according to the latest equalized assessment thereof: *Provided*, that for the building and maintaining of bridges over streams near county lines in which both are interested and where the cost thereof is less than \$5,000, the expense of building and maintaining any such bridge shall be borne by both counties in such portion as shall be just and equitable between the counties, taking into consideration the taxable property in each, the location of the bridge, and the advantage of each, to be determined by the commissioner in making contracts for the same, as provided for in section 37 of this act."

None of the bridges in question are of class (1). Seven of the nine are of class (2) and are located on the county line road running east and west between the two counties. The other two bridges are of class (3) located within eighty rods of the county line. These nine bridges were so worn and decayed that new bridges in their places were necessary and the cost of building the seven bridges on the county line would be from \$185, the least expensive, to \$1,230, the most expensive, and to build the two bridges near the county line would cost \$700 and \$1,330, respectively. It was stipulated that if said bridges are required to be built by said counties, each should pay one-half the cost thereof, and further stipulated that no contract had ever been entered into between said counties to build, repair or maintain any of said bridges, and that both

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of said counties are under Township Organization. The stipulation covered other facts not necessary to be here noticed. The court granted the prayer of the petition as to the seven bridges on the county line road, and denied it as to the two bridges within eighty rods of the county line. By appropriate assignment of errors and cross-errors such action of the court is here presented for review. Counsel say there is no reported judicial construction of this statute, and we know of none. There was a similar provision in the Revised Statutes of 1874, sec. 107, p. 930, reading as follows: "Bridges over streams which divide towns or counties and bridges over streams on roads on county or town lines, shall be built and repaired at the equal expense of such towns or counties: *Provided*, that for the building and maintaining of bridges over streams near county or town lines, in which both are equally interested, the expense of building and maintaining any such bridges shall be borne equally by both counties or towns."

This provision was construed by the Supreme Court in *Com'rs of Highways v. Com'rs of Highways*, 100 Ill. 631, and it was said that the provision considered alone seemed to impose a liability, but it was pointed out that the two succeeding sections (108 and 109) provided for the making of joint contracts by the commissioners of the adjoining towns or counties, and for the enforcement of such contracts when made, and that section 107 contained no provision whereby one town could compel another to erect or repair a bridge on a town line; therefore it was held that the clause in section 107 was intended to apply only to cases where contracts had been made as provided in the following sections. The court observed, in discussing the statute then in force, that great injustice might result in not observing the modification of this clause; that a densely populated township on one side of a stream might bankrupt an adjoining township of few

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inhabitants on the other side of the stream by requiring an equal contribution to the building of such bridge. The question again arose in *People v. Com'rs of Highways*, 158 Ill. 197, and two sections of the then existing Road and Bridge law were quoted and discussed and it appears that the first section had been changed, perhaps to meet the suggestion of injustice, by omitting the words "equal" and "equally," leaving the obligation to repair or build bridges on county line roads and bridges on streams which divide county lines the same, except it was to be at the expense of the adjoining municipalities without stating in what proportion, and for the building and maintaining of bridges near county lines it was provided that the expense should be just and equitable, taking into consideration the taxable property of each, the location of the bridge, and the advantage. The statute there recited contained provisions as to the making and enforcing of joint contracts for building such bridges, and the court held that the liability apparently imposed could not be enforced in the absence of contract, but found there was a contract that should be enforced.

The slightly varying imperative provisions under consideration in the two above cited cases do not materially differ from the apparently imperative provisions in the present act, and unless there has been some material change in the following provisions, those two cases control, and one county cannot compel another to contribute to the building of a bridge. Under the former statutes it was held, as we have seen, that while the obligation to build and repair bridges was in the first clause clearly imposed on adjoining counties and towns, still because the Legislature in that section of the statute had not provided any way of enforcing the imposed duty but in the succeeding two sections had provided that it should be arranged by contract between the authorities, that the duty could not be enforced in the absence of a contract. It is

to be presumed that the Legislature had these former statutes and their construction by the Supreme Court in mind when it passed the present statute. It left entirely the same clause (omitting towns) requiring adjoining counties to build the three classes of bridges mentioned, and met the suggestion that no way was provided in that section for enforcing the duty by providing a way as to a part, but not all of the bridges falling within the designation in the first clause, and left the succeeding sections with practically the same force and effect bearing on the construction of the first clause as in the former statutes. Counsel suggest, in substance, that the Legislature must have intended that this first clause should be enforced by mandamus; that there is no good reason why it should impose the duty as to all bridges and then limit the right of enforcement to a part of the bridges. But if the right to enforce the first provision of the statute requiring counties to join in the building of all bridges of a certain description must depend upon a clause in that section providing for the enforcement of the duty, then it seems to us we must look at the clause claimed to have that effect, and if it is clearly limited to a part only of the bridges first designated, the court is not at liberty to extend its effect to all of the bridges, even though it cannot be perceived why the Legislature limited it to a part of them. The present act makes one such change by expressly providing for compelling a county to aid in building a bridge on a stream which is the boundary line, or within eighty rods of such boundary line, if the cost of such bridge will equal or exceed \$5,000; but the first seven bridges here in question were neither on such a stream nor was the cost of any of them \$5,000, and if we read "within eighty rods of such boundary line" as meaning within eighty rods of the county line, still the two other bridges are excluded because neither of them were to cost \$5,000. Therefore, there

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is no express provision in the present statute for compelling the county of Lee to aid in building any of these nine bridges. But there is a proviso as to bridges over streams near county lines that cost less than \$5,000. Assuming "near" is to be read "within eighty rods," we have a description of the last two bridges in question here, and it is imperatively said that the cost shall be borne by both counties in practically the same language as to proportionment found in the statute under discussion in the *People v. Com'rs of Highways, supra*. But there is no direction as to enforcing the duty, and the adjustment of the relative amounts to be paid is fixed by reference to a succeeding section, as it was in the former act.

We do not see that the statute admits of a different construction from that given former acts in the two cases above cited. We are therefore of the opinion that the court erred in granting the prayer of the petition as to the seven bridges on the county line road, and did not err in refusing to grant the prayer of the petition as to the two bridges within eighty rods of the county line. That part of the judgment granting the prayer of the petition as to the seven bridges on the county line is reversed, and the part denying the prayer of the petition as to the two bridges near the county line is affirmed.

*Reversed in part and affirmed in part.*

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**A. H. White, Defendant in Error, v. Chicago, Peoria & St. Louis Railroad Company, Plaintiff in Error.**

**Gen. No. 6,206.**

1. RAILROADS, § 416\*—*how decree of foreclosure providing for enforcement of payment out of assets of sale and assumption of liabilities construed.* Where a decree ordering the sale of a railroad under foreclosure requires the purchaser at such sale to assume certain liabilities incurred by the receivers of such railroad before the

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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foreclosure, and also provides for enforcing the payment of such claims out of assets received by the purchaser at the sale, the provision as to assumption of liabilities is independent of the provision for enforcing payment out of the assets.

2. RAILROADS, § 427\*—*when liability of purchaser at foreclosure sale for personal injuries based upon decree.* In an action by a passenger for personal injuries which first accrued against the receivers of a railroad corporation, where defendant is either the purchaser or assignee of the purchaser at a foreclosure sale of the property of such corporation under a decree requiring such purchaser and its assigns to assume and pay all liabilities incurred by such receivers in the operation of such railroad, defendant's liability rests on the provisions of such decree, and compliance therewith.

3. PLEADING, § 100\*—*what is effect of plea of general issue in action for negligent injuries.* In an action to recover for personal injuries alleged to be the result of negligence, a plea of the general issue is to be treated as a plea of not guilty and as a general denial of the material averments of the declaration.

4. RAILROADS, § 427\*—*when purchaser at foreclosure sale assumes liabilities.* Where a decree ordering the sale on foreclosure of the property of a railroad required the purchaser at such sale or its assigns to assume, as part of the purchase price, all liabilities incurred by the receivers remaining unpaid at the time of sale, such purchaser or its assigns, by acquiring such property, undertook to pay such liabilities when established as provided by the decree.

5. RAILROADS, § 53\*—*when purchaser at foreclosure sale assuming liabilities may be sued.* In an action on a liability first accruing against the receivers of a railroad before the sale of its property under foreclosure, where defendant is either the purchaser at such sale or the assignee of such purchaser, and where the decree ordering such sale requires such purchaser and its assigns to assume and pay all liabilities incurred by such receivers when such liabilities are established as provided by such decree, defendant cannot contend that the liability of the receivers has not been established where they are joined as parties, since defendant is the only party having a real interest in the defense, and is permitted to control such defense and required to assume its burdens.

6. RAILROADS, § 427\*—*when purchaser at foreclosure sale directly liable for claims against receiver.* Where a decree ordering the sale under foreclosure of the property of a railroad corporation requires that the purchaser at such sale or its assigns unconditionally assume and pay all liabilities accruing against the receivers of such corporation, such liability may be enforced in an action at law directly against such purchaser or its assigns.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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7. **CONTRACTS, § 349\***—*when person not party to contract right of action in own name.* A third person not a party to a contract made for his benefit may maintain an action in his own name for a breach of such contract.

8. **RECEIVERS, § 46\***—*how claims against enforced.* Receivers of corporations are not personally liable for claims accruing against them as such receivers, but property in their hands as such receivers may be subjected to the payment of such claims, after the sale of such property by such receivers.

9. **RAILROADS, § 427\***—*when provisions in foreclosure decree as to establishment of assumed claims against purchaser complied with.* In an action on a liability first accruing against receivers of a railroad corporation, where defendant is the purchaser or assignee of the purchaser of the property of such corporation at a foreclosure sale under a decree requiring such purchaser or its assigns to assume and pay all liabilities incurred by such receivers before foreclosure, provided that such liabilities are established as provided by the decree, a plaintiff has substantially complied with the provisions of such decree as to the establishment of his claim where such purchaser or assignee defends the action in the State Court, although such receivers are not joined as parties to the action.

10. **APPEAL AND ERROR, § 1699\***—*when error in overruling motion to direct verdict waived.* It is not error to overrule a motion made by defendant at the close of plaintiff's evidence for a directed verdict in its favor on the ground of variance where defendant did not rest, but introduced evidence on its own behalf, thereby waiving any error in overruling its motion.

11. **CARRIERS, § 476\***—*when evidence sufficient to establish ownership of railroad.* In an action to establish a claim for personal injuries sustained by a passenger by stepping off the unlighted platform of a railroad depot, which claim first accrued against the receivers of such railroad corporation before foreclosure, and where defendant was alleged to be the owner of such railroad by assignment from the purchaser of such railroad at a foreclosure sale ordered by a decree requiring that such purchaser or its assigns assume such liabilities when established as required by the decree, evidence held to warrant a finding that at the time the action was brought defendant was in possession of and was operating the railroad as owner, and that it could have become such owner only as the purchaser or as assignee of the purchaser at such sale.

12. **EVIDENCE, § 471\***—*when evidence sufficient to prove facts.* Slight evidence, not so clear and accurate as is required on disputed questions, is sufficient to prove facts which no one is expected to or

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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does deny, and which are naturally assumed from the history of the case.

13. **CARRIERS, § 362\***—*when evidence sufficient to establish negligence in failing to light station platform.* In an action by a passenger to establish a claim for personal injuries sustained as a result of stepping off a railroad platform in the nighttime, alleged to be due to the negligence of the receivers of such railroad in failing to light such platform, where defendant had assumed the liabilities of such receivers, evidence *held* to warrant a finding that such receivers were negligent in failing to light the platform.

14. **CARRIERS, § 421\***—*when evidence sufficient to establish exercise of due care by passenger injured by stepping off station platform.* In an action by a passenger to establish a claim for personal injuries sustained by stepping off a railroad platform in the nighttime, where it was alleged that the receivers of such railroad corporation negligently failed to light such platform, so that when plaintiff was looking for a toilet he failed to see the edge of the platform owing to the darkness, evidence *held* to warrant a finding that plaintiff exercised ordinary care.

15. **DAMAGES, § 128\***—*when verdict not excessive in action for personal injuries.* In an action to recover for personal injuries sustained by a man fifty-two years of age, and of an earning capacity of about \$100 a month, where the injuries sought to be recovered for consisted of a fracture of the arch of the foot, causing suffering for several weeks, and resulting in a permanent injury to the foot, materially interfering with walking, a verdict for plaintiff of \$5,000 *held* not excessive.

16. **APPEAL AND ERROR, § 1772\***—*when judgment will not be reversed.* Although an action involves questions which cannot be decided on any existing decisive authority, a court of review will not reverse a judgment in such action where substantial justice appears to have been done, and where there is no reason to suppose that a retrial under different procedure directed by the reviewing court would be more in accord with established methods.

Error to the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed December 8, 1915. *Certiorari* denied by Supreme Court (making opinion final).

STEVENS, MILLER & ELLIOTT, for plaintiff in error;  
WILSON, WARREN & CHILD, of counsel.

DAILY & MILLER and ROBERT N. McCORMICK, for defendant in error.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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MR. PRESIDING JUSTICE CARNES delivered the opinion of the court.

A. H. White, the defendant in error, was injured in the night of November 11, 1912, by stepping off the unlighted depot platform of the Chicago, Peoria & St. Louis Railway Company at Forrest City, Illinois, and falling on the ground, while waiting as a passenger to take a train. The company was at that time in the control of receivers appointed by the District Court of the United States for the Southern District of Illinois, Southern Division, in a foreclosure suit there pending. Afterwards, and before this suit was begun, there was a sale of all the railway property in said foreclosure proceeding, and the plaintiff in error, with the same name as the other corporation except the word "railway" was changed to "railroad," seems to have acquired title to the property under the foreclosure sale, and was operating the road when this suit was commenced. Under the decree of sale, one so acquiring title was required to pay in addition to the purchase price bid "to the extent that the assets or proceeds of assets in the receiver's hands shall be insufficient for that purpose" among other things, "liabilities which shall have been legally incurred" in the operation of the railway by the receivers, before delivery of possession of the property sold. And it was provided in the decree of sale that any portion of such liabilities not paid prior to such delivery of possession to the purchaser should, when duly established, remain and constitute a fresh lien upon the property in the hands of the purchaser, or his assignee, until fully paid. And further provided that any claim for any such liability incurred during the receivership not presented to the receivers before the delivery of the possession of the property shall be presented for allowance within four months after the first publication by the receivers of a notice pub-

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lished upon the request of any purchaser after delivery of possession of the property to the purchaser, and that claims not presented within four months after said first publication shall not be enforceable against the receivers, the property, the purchaser or his assignees. And further provided if the purchaser, or his assignee, shall refuse, after demand made, to pay any such liability, "the person holding the claim therefor, whether established in a State Court, or any other court of competent jurisdiction, may, upon fifteen days' notice to said purchaser, his or their successors or assigns, file his petition in this (Federal) Court to have his said claim enforced against the property, \* \* \* and that such purchaser, or assignee, shall have the right to appear and make defense to any claim so sought to be enforced. \* \* \* And jurisdiction of this suit is retained by this (Federal) Court for the purpose of enforcing these provisions of this decree." And further provided that such purchaser or assignee "shall have the right to enter his or their appearance in this court or in any other court," and that such purchaser or assignee or any party to the foreclosure suit might contest any claim existing and undetermined at the time of the sale, or any demand presented thereafter which would be payable by such purchaser or assignee, or chargeable against the property purchased in addition to the amount bid by such purchaser.

The part of the decree from which we have attempted to state the provisions applicable to the questions presented here, reads as follows:

"The purchaser or purchasers, his or their successors or assigns, shall, as part consideration and purchase price of the property purchased, and in addition to the sum bid, take the property and receive the deed or deeds therefor upon the express condition that he or they or his or their successors or assigns shall pay, satisfy and discharge—to the extent that the assets or proceeds of assets in the receivers' hands shall be

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insufficient for that purpose—any residue, remaining after the application of the proceeds of the sale of the mortgaged premises, (a) of any unpaid compensation that shall have been allowed by this court to the receivers, (b) of all indebtedness and obligations or liabilities which shall have been legally contracted or incurred, in or about the management and operation of the railroads and properties of the defendant Railway Company, by the receivers before delivery of possession of the property sold; and any portion of such indebtedness, obligations and liabilities which shall not have been paid by the purchaser or by the receivers, prior to such delivery of possession shall, when duly established, remain and constitute a fresh lien upon the property in the hands of the purchaser or purchasers, his or their successors or assigns, until fully paid, satisfied or discharged, provided, however, that any such claims for indebtedness, obligations or liabilities contracted or incurred during the receivership which shall not have been presented to the receivers at the time of delivery of possession of such property shall be presented for allowance within four (4) months, after the first publication by the receivers of a notice published in a newspaper regularly issued, and having a general circulation in Springfield, Illinois, which said publication shall be made at least once a week for a period of four (4) weeks upon request of any such purchaser or purchasers after delivery of possession of the property to the purchaser or purchasers; and any such claims which shall not be presented for allowance within the period of four (4) months after said first publication of notice shall not be enforceable against the said receivers, nor against the property sold, nor against the purchaser or purchasers, his or their successors or assigns; and (c) of any indebtedness and liabilities, contracted or incurred by the defendant Railway Company in the operation of its railroad and property before the appointment

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of the receivers, that are prior in lien to the consolidated mortgage and that shall not have been paid or satisfied out of the income of the railroads and the properties in the hands of the receivers, for the collection and enforcement of which either claims or intervening petitions have been filed in this cause, upon this court adjudging the same to be prior in lien to said consolidated mortgage and directing payment thereof. Any payment for any such purpose made by the purchaser or purchasers, his or their successors or assigns, in advance of the final accounting and discharge of the receivers shall be treated as advances and subject to final adjustment on such accounting. In the event that such purchaser or purchasers, his or their successors or assigns shall refuse, after demand made, to pay any of the aforesaid indebtedness, obligations or liabilities, the person holding the claim therefor, whether established in a State Court or any other court of competent jurisdiction, may, upon fifteen days' notice to said purchaser, his or their successors or assigns, file his petition in this court to have his said claim enforced against the property aforesaid in accordance with the usual practice in relation to claims of a similar character; and such purchaser or purchasers, his or their successors or assigns, shall have the right to appear and make defense to any claim so sought to be enforced, and either party shall have the right to appeal from any order, judgment or decree made thereon. And jurisdiction of this suit is retained by this court for the purpose of enforcing these provisions of this decree.

“And such purchaser or purchasers, and his or their successors or assigns, shall have the right to enter his or their appearance in this court or in any other court, and he or they and any of the parties to this suit shall have the right to contest any claim, demand or allowance existing at the time of the sale and then undetermined or any claim or demand which may arise



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or be presented thereafter, which would be payable by such purchaser or purchasers, his or their successors or assigns, or which would be chargeable against the property purchased in addition to the amount bid by such purchaser or purchasers at the sale; and may appeal from any decision relating to any such claim, demand or allowance.

“The purchaser or purchasers at such sale shall immediately after the confirmation thereof become entitled to enter his or their appearance in this suit and become a party to the record herein, thereby becoming bound by all proceedings thereafter taken in this suit.”

It is to be observed that the purchaser's assumption of liability for payment of claims against the receivers is independent of the provisions for enforcing payment out of assets that the purchaser receives under the sale. The liability, if any, of plaintiff in error, rests on the above provisions in the decree of sale under which it acquired the property, and while it is contended that the evidence does not establish negligence of the receivers or due care of the defendant in error, the principal and difficult question is whether, assuming a case made that would have warranted a judgment against the receivers, the plaintiff in error is liable, in this action in which the receivers are not a party, for a claim that the receivers never had an opportunity to defend.

The declaration, as finally amended, set out the receivership, the wrong and injury complained of occurring during such receivership, the substance of the above quoted provisions of the decree as to liability of purchasers and assignees of purchasers at the receivers' sale; averred that the defendant was such assignee; that there was and had been no funds in the hands of the receivers for payment of the claim; that the claim had been presented to the receivers within four months after publication of notice, as provided in the decree, and had not been paid. The de-

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fendant pleaded the general issue, and a special plea setting out the above quoted provisions of the decree practically as recited in the declaration, and averring that said claim had never been established against said receivers; that said receivers had never been sued thereon or given an opportunity to defend the same in any court of competent jurisdiction, and alleging that until said claim has been so established against said receivers the indebtedness cannot be enforced against the defendant, or the property acquired by the defendant at the foreclosure sale, and that when said claim is established against said receivers the obligation cannot be enforced against the defendant or its property except by filing a petition in said Federal Court. The trial court sustained a demurrer to this special plea, and the defendant, standing by the plea, went to trial on the general issue, which was a plea of not guilty assumed and treated on the trial as a general denial of the material averments in the declaration. A verdict of \$5,000 was rendered, and the court, after denying motions for a new trial and in arrest of judgment, entered judgment on the verdict against the defendant in the usual form, except instead of ordering execution to issue thereon it was provided that the judgment should be satisfied and enforced in manner and form as provided by the order and decree of the Federal Court, referring in apt words to the decree hereinbefore mentioned.

There was proof of the service of notice of claim on the receivers, and demand and refusal of payment within the four months' time limited by the decree, and no question is made of insufficiency of proof of the averment in the declaration that there were no funds in the receivers' hands to pay the claim. The argument of plaintiff in error on this branch of the case rests on its assumption, as stated in its plea, that no direct liability could arise against it until the claim was established in a suit against the receivers.

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Assuming this to be a liability incurred in the operation of the road by the receivers and remaining unpaid at the time of the sale and delivery of the property under the decree, plaintiff in error, by acquiring the property, undertook to pay it when it should be duly established, provided it should be presented for allowance to the receivers within the four months limited, and the decree provided that the claim might be established in a State Court, and plaintiff in error had the right to appear in such State Court and contest the validity of the claim. If the receivers had been made defendants to this suit, and the plaintiff in error had appeared with the receivers and contested the suit, there would have been little, if any, ground for objection that the claim had not been established, in a manner to bring it within the provisions of the decree. In such case plaintiff in error would have been the only party having any real interest in the defense of the suit, and would have been permitted to control the defense and required to assume its burdens. Therefore, the question is whether the defendant in error, by omitting a nominal defendant not interested in the result of the suit and suing the real party interested in defending the claim, has forfeited his right of recovery. If plaintiff in error had unconditionally assumed the payment of all valid claims of this character, we are aware of no reason why its liability could not have been enforced in a direct suit at law against it. It has long been settled law in this State that where one person enters into a single contract with another for the benefit of a third person, not a party thereto, the latter may maintain an action in his own name on such contract for the breach. (*Eddy v. Roberts*, 17 Ill. 505; *Bristow v. Lane*, 21 Ill. 194; *Beasley v. Webster*, 64 Ill. 458; *Snell v. Ives*, 85 Ill. 279; *Thompson v. Dearborn*, 107 Ill. 87.) An additional reason for its application exists in this class of cases, as receivers are not personally liable for such claims, but property in their

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hands may be subjected to their payment under certain conditions, even after its sale by them. (*Bartlett v. Cicero Light Co.*, 177 Ill. 68; *Knickerbocker v. Benes*, 195 Ill. 434.)

It is no doubt true, as counsel say, that plaintiff in error is not liable to any one that has not brought himself within the provisions of the decree. But we are not inclined to hold that the defendant in error in establishing the validity of his claim in a State Court, where it was contested by the only party interested in defending it, has failed to substantially comply with those provisions. No possible benefit to plaintiff in error could have accrued from making the receivers a party to this action after they had executed their trust and turned over all their property and had neither personal nor official interest in defending the claim. We are therefore of the opinion that the court did not err in its rulings on pleadings, evidence and instructions involving that question.

At the close of the plaintiff's evidence the defendant asked the court to direct a verdict in its favor, and among other reasons claimed that there was a variance between the declaration and the proof in that the declaration alleged that the defendant became the purchaser of the property at said foreclosure sale and the proof fails to show who was the purchaser, or who is now the owner of the property, which motion was overruled. The defendant did not rest its case but introduced evidence in its own behalf after this action of the court, thereby waiving any error in so overruling that motion. But at the close of all the evidence it renewed its motion, which was again overruled. In presenting its last motion it did not again suggest a variance, and it may be doubted whether the court, without repetition of the objection, was required to consider that question in ruling on this second motion after more evidence had been heard. But assuming that he was, we are inclined to the opinion that there

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was sufficient proof in the record to warrant the finding that plaintiff in error was, at the time of the commencement of this suit, in possession of and operating the road as owner, and it could only have become the owner as the purchaser or assignee of the purchaser at said judicial sale. The proof on that question is meager, but it is an instance of slight proof of a fact that nobody is expected to deny and nobody does deny, and that is naturally assumed from the whole history of the case, and therefore may be established by evidence not so clear and accurate as is required on disputed questions.

It is urged that the evidence does not show negligence of the receivers or due care on the part of the defendant in error. It appears that Forrest City is a small town. That at the time in question White was a man about fifty-two years old with an earning capacity of about \$100 a month; that he was unacquainted in Forrest City, but reached there and passed near the depot before dark on the day of the injury. After dark he went to the depot and purchased a ticket from the agent in charge. The train that he wished to take was late, and while waiting he went out on the platform to look for a toilet. It was so dark that he could not see the edge of the platform or the ground, and in trying to pass around the end of the depot he stepped off the platform, which extended no further than the depot, and fell a distance of three or four feet, badly injuring his foot, breaking down the arch, resulting in much pain and suffering for several weeks and in a permanent injury, causing pain and materially interfering with his walking. There is no controversy in the evidence as to the manner or extent of the injury. It was a fair question for the jury whether the receivers were negligent in failing to light the platform, and whether defendant in error was exercising such care as ordinarily prudent men would use under similar circumstances. We are of the opinion that they were

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warranted by the evidence in finding these issues in favor of the defendant in error on principles announced in *Toledo, W. & W. Ry. Co. v. Grush*, 67 Ill. 262; *Illinois Cent. R. Co. v. Keegan*, 210 Ill. 150; and *Toledo, St. L. & W. R. Co. v. Stevenson*, 122 Ill. App. 654.

It is also claimed the judgment is excessive, but considering the latitude given juries in assessing damages in such cases, we do not think it is the duty of this court to disturb the verdict on that ground.

There are questions involved that cannot be answered on any decisive authority that we know of. It seems to us substantial justice has been done, and that we cannot award a retrial of the case with any confidence that a different procedure directed by us would be more in accord with established methods. The judgment is therefore affirmed.

*Affirmed.*

MR. JUSTICE NIEHAUS took no part.

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**The People of the State of Illinois, Defendant in Error,  
v. John Goehringer, Plaintiff in Error.**

**Gen. No. 6,071.**

1. JURY, § 68\*—*when challenge to array on ground women not included in jury lists properly overruled.* In a criminal case a challenge to the array on the ground that women were not included among the number of legal voters in making up the jury lists held properly overruled, women being not made eligible for jury service by the fact that they are made voters in elections of certain officers.

2. JURY, § 79\*—*when abridgement of right of examination error.* In a criminal case it is error to abridge defendant's right to a reasonable examination of jurors.

3. JURY, § 80\*—*what questions proper to determine existence of bias.* In a prosecution for keeping open a tippling house on Sunday, where the principal witnesses appearing for the prosecution were

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the same as those appearing in a similar case previously tried, questions propounded to a juror who had also acted as such in such previous trial, as to his memory of such testimony and whether it would influence him in the present trial, examined and *held* proper matters of inquiry, to determine the predisposition and bias of the juror, and his mental state as to fairness.

4. JURY, § 80\*—*how juror may be examined as ground for challenge for cause or peremptory challenge.* Within reasonable limits each party to an action has the right to examine a juror as to predisposition, bias or prejudice, and as to his mental state with reference to fairness in order to show not only a state of facts which may give ground for a challenge for cause, but also to enable the party to decide whether to exercise the right of peremptory challenge.

5. JURY, § 80\*—*what questions proper to determine bias.* It is often indispensable to an intelligent selection of a fair and impartial jury that the occupation, habits, associations and predisposition of a juror be known in so far as such facts might tend to bias or pervert the juror's judgment.

6. JURY, § 3\*—*right to trial by in criminal cases.* Defendants in criminal cases are guarantied a trial by a fair and impartial jury, an object in which society is equally interested.

7. JURY, § 72\*—*what is extent of right to peremptory challenges in criminal cases.* In order to obtain a fair and impartial jury in a criminal case, defendants are given by law the right of peremptory challenge to be exercised at the discretion of such defendant, which right may not be limited or restricted by the courts.

8. JURY, § 79\*—*when reasonable examination should be allowed.* Reasonable examination of jurors by counsel should always be permitted so as to enable the court to see that the jurors stand indifferently between the parties and are possessed of the necessary qualifications.

9. WITNESSES, § 19\*—*when detective competent witness.* In a criminal case the evidence of detectives who have been employed to secure evidence against defendant is competent.

10. WITNESSES, § 216\*—*what latitude allowed in cross-examination of detectives.* In a criminal case where the principal witnesses for the prosecution are private detectives who have been employed and paid to secure evidence against defendant, full opportunity should be given to defendant to test the credibility of such witnesses by cross-examination and by other means provided by law for testing such credibility, and in such case cross-examination should be allowed the same latitude as in the case of a witness who is shown to be personally hostile to defendant.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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11. WITNESSES, § 212\*—*when error to unduly restrict examination of hostile witness.* In a criminal case it is error to unduly restrict the scope of defendant's cross-examination of a witness who is shown to be personally hostile to defendant and to have an inordinate desire that he be convicted, defendant in such case having a right to the broadest latitude in cross-examination, in order to test the credibility of such witness.

12. WITNESSES, § 216\*—*what scope allowed in cross-examination of detectives in prosecution for keeping tippling house open on Sunday.* In a prosecution for keeping a tippling house open on Sunday, where the prosecuting witnesses were private detectives employed and paid to secure evidence against defendant, and where one of the witnesses partly based the accuracy of his testimony on notes taken at the time of the acts testified to, *held* that defendant had a right to a complete cross-examination of such witnesses as to their sobriety on such occasions as bearing on their credibility and on the weight of their testimony, the number of saloons visited and the number of drinks taken bearing legitimately on the accuracy of their observations on those occasions and the reliability of their recollections, as well as on the evidentiary value of such notes.

13. WITNESSES, § 212\*—*when improper to exclude on cross-examination evidence which may be used as basis for impeachment.* In a prosecution for keeping a tippling house open on Sunday, a witness testified that on a named date he had gone directly to defendant's place after reaching North Chicago, and was asked by counsel for defendant on cross-examination: "Did you testify in the case of *People v. Krause*, a few days ago?" Answer: "Yes." "Did you testify that before you got to Goehringer's that you had been to seven or eight places?" On objection the court ruled out the answer to the last question. *Held*, that witness should have been allowed to answer the question, being proper both in form and substance, since the answer might have laid a foundation for the impeachment of the credibility of the witness.

Error to the County Court of Lake county; the Hon. DAVID T. SMILEY, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed December 8, 1915.

E. V. ORVIS and JAMES G. WELCH, for plaintiff in error.

R. J. DADY and E. M. RUNYARD, for defendant in error.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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MR. JUSTICE NIEHAUS delivered the opinion of the court.

In this case the plaintiff in error, John Goehringer, was tried by a jury, in the County Court of Lake county, and found guilty on the fifth, sixth and seventh counts of an indictment, charging him with keeping open a tippling house on Sunday. The plaintiff in error made a motion for a new trial, and in arrest of judgment, but both motions were denied by the court, and he was thereupon sentenced to pay a fine of \$200 on each of the three counts upon which he was found guilty, and costs of suit. It was ordered by the court that he be committed to the county jail until the fine and costs were fully paid; also that in case of his neglect or refusal to pay, he be required to work out the fine and costs on the public roads of Lake county, at the rate of \$1.50 per day.

Various errors are assigned, and it is insisted that plaintiff in error did not have a fair and impartial trial. Plaintiff in error also assigns as error, the overruling of his challenge of the array of jurors, which was on the ground that the county board, in making up the jury lists, had not placed the names of women voters among the number of legal voters, from which the lists were made up. We are of opinion that the challenge was properly overruled. The same point involved here was decided by this court, at the present term, in the case of *People v. Krause*, ante, p. 140. It was there held that while women are legal voters for the election of statutory officers and certain other purposes, they are not thereby made eligible for jury service.

The plaintiff in error also claims that he was denied proper latitude in the examination of jurors; and that his right of cross-examination of the prosecuting witnesses, on material matters, was unduly abridged. It is well settled that a defendant in a criminal case is entitled to a reasonable examination of the jurors, so

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that he may intelligently exercise his right of challenge, either a challenge for cause, or a peremptory challenge, and that it is error to abridge this right. It appears from the record that the plaintiff in error attempted to make a certain inquiry of a juror who had been called to the box, and who had been a juror in another similar case, which had previously been tried, and in which witnesses testified for the prosecution, who also appeared as the principal witnesses on the indictment in the present case. Counsel sought to inquire whether this juror had any impression, from what he had heard in the other case upon the question, whether or not these witnesses were in fact in North Chicago on the Sundays involved. The court would not permit the inquiry to be made. Counsel for plaintiff in error also attempted to inquire if anything the juror had heard, in the case of *People v. Keighko* (in the event the same witnesses testified), would lead him to give more or less credence to the testimony of those witnesses; but the inquiry on objection was cut off by the court. He also attempted to inquire of a juror whether such juror, upon recalling the former testimony of these witnesses in the other case, had any impression as to any of the facts, which these same witnesses had testified to in the other case; but the court sustained an objection to the question. Counsel also attempted to ascertain from a juror this fact: In case any of the witnesses were called in the present case who had been called, either for the State or for the defense, in the other case, which the juror had tried, would the impression the juror had formed of the truth and falsity of their testimony in the other case impress him in this case? But the court sustained an objection to the question, and cut off the inquiry. This question also was asked of a juror: "Have you any impression, assuming that those witnesses who will testify that they were in North Chicago on the same dates and in this particular defendant's place on one

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of those dates, the facts that you have heard in the other case, would you have any impression now as to whether any of those facts are true or false?" But an objection to the question was sustained by the court, and the inquiry cut off.

We are of opinion that all the matters suggested by these questions were proper matters of inquiry. The right to examine a juror for the purpose of ascertaining his predisposition, or his bias, and his mental state, with regard to fairness, with a view to the intelligent exercise of the right of challenge, would be of very little value, if answers to questions such as these indicated could not be elicited. "Within reasonable limits, each party has the right to put pertinent questions, to show not only that there exist proper grounds for a challenge for cause, but to elicit facts, which will enable him to decide whether or not he will exercise his right of peremptory challenge." (Thompson on Trials, 99.)

"In order to determine whether the person who may be called as a juror possesses the necessary qualifications, whether he has prejudiced the case, whether his mind is free from prejudice or bias, the suitor has the right to ask him questions, the answers to which may tend to show that he may be challenged for cause, or disclose a state of facts from which the suitor may see proper to reject such juror peremptorily." *Lavin v. People*, 69 Ill. 304.

And the Supreme Court in the case of *Donovan v. People*, 139 Ill. 412, reiterated with increased emphasis the rule expressed in the *Lavin* case, *supra*. The language of the court on this point is as follows: "It is often indispensable to an intelligent selection of a fair and impartial jury, that the occupation, habits, associations and predisposition of the juror should be known, so far as they might tend to bias or pervert his judgment. To deprive a party, whether the People or the defendant, of an intelligent exercise of the right, is practically to take away the right. And every lawyer

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experienced in the trial of causes knows that to its intelligent exercise a reasonable examination of the juror is frequently absolutely necessary. If this may not be done, the People and the defendant alike must take all who are not subject to challenge for cause, or resort to peremptory challenge indiscriminately, and without that knowledge, easily within reach, if reasonable examination is permitted, which would enable them to exercise the right intelligently. The defendant is guarantied, in every criminal case, a trial by a fair and impartial jury, and society is equally interested in the selection of none other; and in view of this object to be attained in impaneling the jury, the law-making power of the state has deemed it wise to give the right of peremptory challenge, to be exercised in the discretion of the party entitled, and the courts are not authorized to limit or restrict the right \* \* \*. Such reasonable examination by counsel should always be allowed as will enable the court to see that the jurors stand indifferently between the parties and are possessed of the requisite qualifications, and also to enable counsel to challenge for cause, if cause exists, or to exercise the right of peremptory challenge when in their judgment it is deemed necessary or advisable."

It is apparent that the cross-examinations of the prosecuting witnesses were also unduly restricted. The evidence of guilt of the plaintiff in error did not come from officers who are chosen or charged with the duty of investigating violations of law, and with the duty of procuring the evidence of the guilt, but rested upon the testimony of two private detectives, who had been employed to secure the evidence upon which to base a conviction, for a certain remuneration.

This class of witnesses are legally competent; but it is clear, also, that a defendant in a criminal case should be given full opportunity to apply the tests provided by law for determining the credibility of such witnesses, one of which is cross-examination; and the

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cross-examination should not be any more restricted in the case of such witnesses, who, because of apparent personal interest in the result of a trial, may have developed an inordinate desire to secure a conviction, than of a witness who, by reason of personal hostility to the defendant, has perhaps developed the same kind of a desire. In all such cases, the broadest latitude in cross-examination should be allowed, and it is error to unduly abridge it. *Sutton v. People*, 119 Ill. 254.

Complete cross-examination of these prosecuting witnesses, concerning matters which might have a material bearing on their credibility, such as the condition of these witnesses with reference to sobriety, should have been allowed. Their condition as to sobriety was an essential element to be considered, in determining not only the accuracy of their observations, and the reliability of their recollection, but also the evidentiary value of the notes which they claim to have taken on the Sundays in question, upon which one of these witnesses testified, he partly based the accuracy of his testimony. The number of saloons which they visited on the Sundays in question, as well as the number of intoxicating drinks which they imbibed, therefore had a legitimate bearing upon the weight of their testimony.

It also appears in the record that the witness Walter F. Youngs, having previously testified that on May 3rd, after reaching North Chicago, he had gone with his brother directly to the place of the plaintiff in error; and the counsel for plaintiff in error propounded the following questions: "Did you testify in the case of *People v. Krause*, a few days ago?" Answer: "Yes." "Did you testify, that before you got to Goehringer's, that you had been to seven or eight places?" The latter question was objected to, and the court sustained the objection and ruled out the answer. This question was a proper one, in form and substance; and the witness should have been al-

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lowed to answer it, inasmuch as the answer might have laid the foundation for an impeachment of the credibility of the witness. *Math v. Chicago City Ry. Co.*, 243 Ill. 122; *Chicago City Ry. Co. v. Matthieson*, 212 Ill. 292; *Chicago West Division Ry. Co. v. Ingraham*, 131 Ill. 668.

For the errors mentioned, the case must be reversed and the cause remanded for another trial.

*Reversed and remanded.*

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**Adella Diggins et al., Appellants, v. E. L. Axtell et al., Appellees.**

**Gen. No. 6,074.**

1. MORTGAGES, § 714\*—*when grantee purchasing real estate from purchaser at foreclosure sale not innocent purchaser for value.* In a bill to redeem real estate from a master's certificate of sale under a foreclosure of a mortgage, where the legal title to the real estate sought to be redeemed is in a grantee of the purchaser at such foreclosure sale, no question of such grantee's being an innocent purchaser for value without notice of complainant's claim arises where it appears from the findings of the master, which were approved by the court, that such grantee purchased such real estate subject to any rights which complainant might be able to enforce by law against such real estate.

2. MORTGAGES, § 730\*—*when agreement for extension of time for redemption will be enforced.* Courts of equity will enforce agreements involving an extension of the statutory or legal period of time for the redemption of property from a foreclosure sale.

3. WITNESSES, § 252\*—*how credibility of witness on disputed fact determined.* Where there is a direct conflict between the testimony of two witnesses as to a question of fact, the question as to which witness has sworn truthfully must be determined by considering the circumstances which may corroborate one or the other of such witnesses.

4. MORTGAGES, § 720\*—*when evidence sufficient to sustain finding as to oral agreement for extension of time to redeem.* On a bill to redeem real estate from a master's certificate of sale under fore-

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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closure of a mortgage, evidence *held* sufficient to sustain a finding that an oral agreement was made for the extension of the time to redeem beyond the statutory period.

Appeal from the Circuit Court of McHenry county; the Hon. CHARLES WHITNEY, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded with directions. Opinion filed December 8, 1915.

FISCHER & NORTH and E. H. WAITE, for appellants.

JOHN B. LYON and BARNES & BARNES, for appellees.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

In this case the appellants, Adella Diggins and her husband, Lon O. Diggins, filed a bill in equity, in the Circuit Court of McHenry county, to redeem the premises described in the bill from foreclosure sale made February 18, 1911. The property in question, which was the residence of appellants, was purchased at said sale by the appellee E. L. Axtell, for the sum of \$2,450, and a master's certificate of sale issued to him therefor. The evidence shows that appellants had mortgaged the property in question to R. A. Nugent, as security for an indebtedness of \$2,000, and having made default in the payment of the interest due, foreclosure proceedings were instituted; and that this sale made was pursuant to a decree in those proceedings. No redemption was made from the sale; and on July 24, 1912, two months after the statutory period for redemption had expired, a master's deed was issued to the appellee E. L. Axtell on his certificate of sale. Afterwards, on August 14, 1912, the appellee Axtel by deed conveyed the premises to the appellee William Doyle.

The appellants remained in actual occupancy of the property during the period of redemption, and since that time, and they were occupying the premises at

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the time of the making of the deed by appellee Axtell to appellee Doyle. The bill alleges that the appellee Axtell verbally promised to extend time of the statutory period of redemption, from May to November, 1912; and that appellants, relying on the promises of appellee Axtell, expended large sums of money in making improvements upon the premises, and in payment of taxes and special assessments which became due and payable during said period of redemption, and after the expiration thereof.

The cause was referred to a special master, to take proofs and report his conclusions, and he heard the evidence and reported the same, together with his conclusions, to the court. The special master found against the contention of appellants that an agreement or arrangement had been entered into by appellee Axtell and appellants, whereby the redemption period was extended. The special master also found that appellee Doyle had sufficient notice of the interest in the premises claimed by appellants to put him upon inquiry as to such interest. Appellants filed exceptions to the findings of the special master, which exceptions were overruled by the court, and a decree entered approving the findings and dismissing appellant's bill, from which decree the appellants have prosecuted an appeal to this court.

The question of the rights of an innocent purchaser for value, without notice of interests claimed by appellants, is not involved in this case, as it appears from the findings of the master, which were approved by the court in its decree, as well as from the evidence in the case, that appellee Doyle had sufficient notice of appellants' claim; in fact, he really purchased the premises from appellee Axtell, subject to whatever rights appellants might be able to legally assert or enforce in the premises. The controlling question involved is whether the appellee Axtell, positively or by necessary implication, extended the time for the re-

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redemption of the property in question, while the right of redemption existed. The law is well settled that courts of equity will enforce agreements of this nature, which involve an extension of the statutory or legal period of time for redemption of property from a foreclosure sale. *Union Mut. Life Ins. Co. v. White*, 106 Ill. 67; *Nichols v. Otto*, 132 Ill. 91; *Davis v. Dresback*, 81 Ill. 397; *Pensoneau v. Pulliam*, 47 Ill. 58; *Union Mut. Life Ins. Co. v. Kirchoff*, 133 Ill. 368.

The question, therefore, resolves itself into one of fact to be decided from the evidence; and upon this question there is a conflict of evidence between the appellee Axtell and the appellant Lon O. Diggins; and "to determine which has sworn truthfully we must look to the attending circumstances that may corroborate one or the other." *Union Mut. Life Ins. Co. v. White*, 106 Ill. 70. The appellant Lon O. Diggins testified that about the middle of August, 1912, more than six months before the appellants' time for redemption had expired, he had a conversation with appellee Axtell, relative to making an arrangement about saving the property involved for his wife, and he inquired of Axtell whether Axtell wanted the place for himself, and that Axtell answered he did not. Diggins thereupon informed Axtell that his wife had been willed one-eighth of the entire estate of his mother, and would get this share, in money, in November, 1912; and that this share would be abundantly sufficient to take care of the mortgage indebtedness represented by the master's certificate held by Axtell; that Axtell thereupon said he wanted to look at the will, and Diggins, within a day or two, procured a copy of the will and brought it to Axtell, and said to him, after Axtell had read it, "You may see it is just as I told you it was," and that Axtell admitted that it was so; and then inquired how he wanted to fix up the matter, whereupon Diggins suggested that appellants would like to have back a clear title to the place, and give Axtell a note

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and mortgage, which would be taken up when his wife would get her share in the estate of his mother, in November, 1912; and that Axtell replied, "I think, that will be all right;" and added, "I will think it over," or "I will talk it over with my father." That afterwards, within a couple of days, and before the expiration of the time of redemption, appellant Diggins again went to appellee Axtell and asked him about the matter, and explained to him that he wanted to know about it, because he was in a hurry to make some improvements on the house, if they were going to keep the place; that Axtell, on that occasion, gave him this assurance: "That will be all right, Lon; we will do that; go ahead and make any improvements; that will be all right." That appellants then, with the knowledge and approval of appellee Axtell, went ahead with the improvements on the house; and among other things, painted it; also the barn, at a cost in labor and materials of about \$50; that they put in sewer connections, at a cost of about \$40; that they paid special sewer assessments, amounting to about \$67; that they paid the general taxes for the year 1911 and for the year 1912, amounting together to \$46.81; and that they made other smaller expenditures.

Diggins testified further that he tried to get the matter of the note and mortgage to be given to Axtell arranged repeatedly; that he asked Axtell several times if he would "go on and complete the deal," and Axtell answered that he would as soon as he could get B. F. Manley, who was appellee Axtell's lawyer, to do it; that he, Diggins, thereupon asked Manley a number of times if Axtell had done anything about getting those papers made out, and Manley's answer was that he had, and that he kept on insisting, until finally Manley drew a note and mortgage, which was duly executed by appellants; and that thereupon he had a meeting with Axtell, who after looking at the note and mortgage wanted to consult with his father

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about the matter; and after doing so, declined to accept them, because his father had advised him to "leave the matter as it was"; and that his father had said "it was just as well to leave it that way and not exchange any papers, as it would only make additional cost and expense"; but at that time, giving him the following assurance: "Your wife will get the money in November, and you can pay it when you get it."

Appellee Axtell denied that he agreed to take a note and mortgage for the amount due on his master's certificate, and also denied that he agreed to extend the time of redemption to November, 1912, but admitted, on cross-examination, that he did say to appellant Diggins, in Manley's office, when he declined to take the note and mortgage, "Pa says you better let it stand as it is," indicating to appellants that they would be just as well off to let the matter stand as it was. Appellee Axtell also denied that he used some of the language attributed to him bearing upon the question of the extension of the time; but the incidents following the conversations, and the circumstances connected with and surrounding various transactions, admitted by the parties to have occurred, clearly indicate that appellee Axtell either stated to Diggins, or led him to believe, that he did not want to cut off appellants' retaining the property, by the expiration of the time for redemption; but that all he wanted was his money, and interest, and that appellants would have time to arrange this matter of the redemption of the property until November, 1912. It is clear that the appellants had a well-grounded belief to this effect; otherwise they would not have gone on and expended over \$200 on the property. It would be most unnatural to assume that, in their financial condition, they would have put into property, in order to improve it, preserve it, and enhance its value, the sum of money stated, if they had any idea that they were not going

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to retain the title to the property; and the acts and conduct of appellee Axtell towards appellants, with reference to the property in question, after the alleged arrangement for an extension of time, strongly corroborate appellant Diggins' version of the matter. For instance, appellee Axtell, before the time of the alleged arrangement for the extension of time, paid the taxes, as holder of the master's certificate, in the year 1911; but did not pay taxes afterwards; he did not take out his master's deed for two months after he was entitled to it, and when he got this deed he did not treat the property as though he was entitled to it as owner, or as though appellants no longer had any interest in it, nor did he attempt to get possession of it under his deed. He did not attempt to collect any rents for its occupancy, by appellants; nor did he make any direct demand for the possession of the property, until after he had made arrangements to transfer it to appellee Doyle, which was in August, 1912. He admits that several months after the expiration of the statutory redemption period he asked appellant Diggins to pay up, and at that time gave as a reason for wanting the money that he needed it right away, because he wanted to build himself a home. Why he should ask appellants to redeem this property, if he thought that he had lost their right of redemption, and that he was the owner of it and not obligated to let them redeem, is not evident; it surely is not in harmony with the position afterwards, and now, taken in this case, that he had nothing from which it could reasonably be inferred that they could redeem after their statutory right had expired. Even in his negotiations with appellee Doyle, he seemed to have been conscious of the fact that appellants had some rights in the property, which they might be able to enforce, for he agreed with Doyle that unless he could obtain the possession of the property, for Doyle, that Doyle should receive back from him the consideration which

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Doyle had given. All the acts and conduct of appellee Axtell as well as the acts and conduct of appellants, are consistent upon the theory that an arrangement was made for an extension of the time of redemption, but are wholly inconsistent with appellees' claim, that no such arrangement was made.

The weight of the evidence on the question of the arrangement to extend the time is therefore clearly on the side of appellants; and we are of opinion that the exceptions to the finding of the special master, that there was no arrangement for the extension of the time of redemption, should have been sustained by the court; and that the court should have granted the prayer for relief and allowed the appellants to redeem said property. The decree is therefore reversed and the cause remanded with directions that the court grant the relief prayed for; and that the appellants be allowed to redeem, by paying to the appellee Axtell, by a short day to be fixed by the court, the amount paid by him at the foreclosure sale, and six per cent. interest thereon, from the date of said sale to the date fixed by the court for redemption; also the amount paid by appellee Axtell for taxes in 1911, with six per cent. interest thereon, from the date of such payment to the date fixed by the court for redemption; and that upon such payment, the deed of conveyance by appellee Axtell to appellee Doyle be ordered canceled and set aside; also the mortgage and note executed by appellee Doyle to appellee Axtell; and that the appellee Axtell be required, upon such redemption, to reconvey, by proper deed, to appellant Adella Diggins, the title acquired by him in and to the property, through said master's deed and certificate.

*Reversed and remanded with directions.*



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**John Riley, Appellant, v. John J. Webb et al.,  
Appellees.**

**Gen. No. 6,218. (Not to be reported in full.)**

Appeal from the Circuit Court of Will county; the Hon. ARTHUR W. DE SELM, Judge, presiding. Heard in this court at the October term, 1915. Transferred to Supreme Court. Opinion filed December 8, 1915.

**Statement of the Case.**

Bill in equity by John Riley, complainant, against John J. Webb and others, defendants, to contest the will of Thomas H. Riley, deceased. Complainant was one of the heirs at law of testator, who died leaving a widow and no descendants, and whose heirs at law were his brothers and the daughter of a deceased brother. From a decree sustaining the will, complainant appeals.

THOMAS H. RILEY and BRICKWOOD & BRICKWOOD, for appellant.

JOHN W. DOWNEY and CORLETT & CLARE, for appellees.

PER CURIAM.

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**Abstract of the Decision.**

1. APPEAL AND ERROR, § 126\*—*when appeal from decree sustaining will raises question of freehold.* An appeal from a decree sustaining a will raises a question of freehold where the will devises real estate to the widow of testator which such widow could not have taken as heir at law, and makes other devises of real estate and annuities charged on real estate to persons not heirs at law, since if the will had been set aside all such interests in the real estate would have been defeated, and the real estate so devised would have

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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in part passed to heirs at law who took nothing under the will.

2. **APPEAL AND ERROR, § 123\***—*when Appellate Court no jurisdiction of question involving freehold.* The Appellate Court has no jurisdiction to determine a question of freehold.

3. **APPEAL AND ERROR, § 123\***—*when cause improperly appealed will be transferred to Supreme Court.* A cause improperly appealed to the Appellate Court because involving a freehold will be transferred to the Supreme Court under section 102 of the Practice Act (J. & A. § 8639).

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**The People of the State of Illinois, Defendant in Error,  
v. Colin H. Ostrander, Plaintiff in Error.**

**Gen. No. 6,158.**

1. **INTOXICATING LIQUORS**—*when title to liquor passes.* The rule as to when title to ordinary chattels passes has no application to a case where the sale in question was of a bottle of intoxicating liquor in violation of law, and where the sale was a mere device by which it was sought to give a color of legality to such a sale.

2. **INTOXICATING LIQUORS**—*when title to liquor passes.* Title to liquor bought will not pass merely on payment of the price, and will only pass on delivery where no specific bottle of liquor is purchased, and where at the time of payment the liquor actually delivered had not been separated from the bulk, it being possible for the vendor at any time between separation and delivery to substitute another bottle for that finally delivered.

3. **INTOXICATING LIQUORS, § 67\***—*what constitutes violation of Sunday closing law.* In a prosecution for keeping a tippling house open on Sunday, the keeping of such a house open on Sunday to serve intoxicating liquors therein *held* a violation of the statute, although it appeared that defendant received no money for liquor delivered on that day and collected such money in advance on Saturday, it also appearing that the purchasers of the liquor paid for on Saturday were tippling on Sunday in defendant's place with the liquor so paid for.

Error to the County Court of Lake county; the Hon. PERRY L. PERSONS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed December 27, 1915.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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A. L. TOMPKINS and GEORGE W. FIELD, for plaintiff in error.

R. J. DADY, for defendant in error.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Ostrander kept a summer hotel at Fox Lake in Lake county and a licensed dramshop in connection therewith. He was convicted and fined under a count of an information which charged him with keeping open a tippling house in said county on Sunday, May 30, 1915, and brings that judgment to this court for review.

The witnesses for the People were two detectives from Chicago, and for the defendant, himself, his bartender and another. Said two detectives came to the hotel on the preceding Thursday and took rooms there and stayed until Monday. They drank whisky at Ostrander's bar on Thursday, Friday and Saturday. The evidence of the witnesses for the People and for the defense differs in unimportant particulars; but the evidence of the witnesses for defendant establishes the main facts upon which the prosecution rely to support the conviction. On Saturday evening, Ostrander said to the two detectives that if they wished to get any liquor on Sunday they must pay for it that evening, as he did not take money for liquor on Sunday. They acquiesced and each paid the bartender a sum of money, the exact amount being in dispute and unimportant. They then left the saloon. After they had gone away, Ostrander got a bottle in which Jamaica ginger had been kept and put into it a certain quantity of whisky of the brand which these two detectives had been drinking, and evidently he put in the quantity that would be paid for by the money which they had paid to the bartender for that purpose. He placed this bottle on the bar afterwards, and told his bartender that if these men called for any whisky Sunday to serve them from that bottle. The saloon was open

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all day Sunday until ten o'clock at night. These detectives went there and called for whisky and were served with whisky from that bottle at least twice, if not more times, that day. They saw people there when they were there sitting at tables and drinking what had the appearance of beer and whisky; but they did not know what it was, in fact, that the other people drank, and defendant and his bartender denied that they served intoxicating liquor that day to any one other than the People's witnesses. This was a tippling house, it was open all day Sunday and defendant's bartender served whisky on either two or three occasions at least to these detectives. The sole defense is that when they paid for the whisky on Saturday night, it became their whisky without delivery, and therefore no whisky was sold in this barroom on that Sunday, and that what was delivered to these men was their own whisky.

We are not disposed to hold that the rule which prevails as to when the title to ordinary personal chattels passes has any bearing upon this case. The Supreme Court and this court have frequently disapproved of devices by which a color of legality was given to sales of liquor not authorized by law. The rule contended for does not apply to the facts of this case in any event. The detectives did not buy and pay for any specific bottle of liquor. They merely paid for whisky that was to be served to them on Sunday. No whisky had been separated from the bulk while they were in the saloon that Saturday night. After they had left the saloon, defendant did separate and set apart some liquor for them, but it had not yet been delivered and they had not been advised of that separation, and he undoubtedly could have substituted any other bottle of liquor for it at his pleasure. If by what he did with these two men he evaded the requirement of the statute forbidding the keeping open of a tippling house on Sunday and escaped being liable for

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a violation of the statute, he could have made other contracts with other men of a similar character on the same Saturday night, and might have been busy all day Sunday delivering and serving the liquor so paid for the night before. A similar question was presented to the Court of Criminal Appeals of Texas in *Wallis v. State*, 78 S. W. 231, where, after stating the evidence, the court said:

“So, under the proof, the case resolves itself into the proposition whether a saloon keeper can make sales of his goods on Saturday, put them in the refrigerator, keeping them cool until Sunday, and then deliver said goods to his customers. If he can do it in one instance, he can do the same thing in another or other instances. And if he should make a sufficient number of sales for delivery on the next day, his house might be thus kept open the entire day to consummate deliveries. An essential part of the business of a saloon keeper is the keeping of his drinks cool, or the cooling of them with ice in the summer; and if he can make sales on Saturday, and keep the goods of the purchasers in his refrigerator for delivery on Sunday, he would be compelled to keep open for that purpose. Although he makes no sale on Sunday, and receives no money on Sunday for goods previously sold, still he has brought about the necessity of keeping open for the delivery of his wares. It is true the proof here shows only a specific instance of delivery, and that was through the broken glass of his back door; still he kept open for this purpose, and in pursuance of an agreement to deliver the goods on Sunday.”

The conviction of the defendant was there sustained. That case was decided January 13, 1904, and seems never to have been published in the reports of that State, but we are advised that its omission was accidental. According to the quotations in the brief for defendant in error, conviction has been sustained in a like case in *Rex v. Clark*, 27 Ont. L. Rep. 525, and 31

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Am. & Eng. Ann. Cases, 637; and that case is based upon the English cases of *Noblett v. Hopkinson*, 2 K. B. 214; and *Saunders v. Thorney*, 78 L. T. (N. S.) 627. We have not access to those cases and merely cite them for the information of the bar. It is our view that by keeping his dramshop open on Sunday to serve intoxicating liquors therein, defendant was violating the statute in question, and that he is not relieved of responsibility by the fact that he collected the pay therefor in advance on Saturday, and did not receive the money therefor on Sunday. These men were tippling in his dramshop on Sunday with intoxicating drink which he there delivered to them, and he kept the place open for that purpose. The rulings on the instructions conformed to these views. The judgment is therefore affirmed.

*Affirmed.*

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**Frank Michels, Appellee, v. Charles S. McCarty,  
Appellant.**

**Gen. No. 6,224.**

1. INJUNCTION, § 177\*—*when terms "city marshal" and "chief of police" used to describe same person.* In a bill by a city official claiming to be "city marshal and chief of police," to restrain another claimant to such office from interfering with complainant's performance of duty as such, it is to be inferred that the terms "city marshal" and "chief of police" are used in the bill to describe the same office.

2. MUNICIPAL CORPORATIONS, § 119\*—*how officer removed from office.* Under section 7, art. II, part I, of the Cities and Villages Act (J. & A. § 1291), authorizing the mayor of a city to remove any officer appointed by him, and requiring such mayor on such removal to state his reasons therefor to the city council within ten days, an officer so removed stands suspended and is restored to office only by the failure of the mayor to file such reasons within the time limited,

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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or by the disapproval by the city council by a two-thirds vote of such removal.

3. MUNICIPAL CORPORATIONS, § 119\*—*when officer removed by failure of council to disapprove of action of mayor.* If a city council fails to disapprove by a two-thirds vote of the removal by the mayor of a city officer appointed by him under section 7, art. II, part I, of the Cities and Villages Act (J. & A. ¶ 1291), after the mayor has filed his reasons for such removal as required by such section, such officer stands removed.

4. INJUNCTION, § 182\*—*when allegation as to nontermination of office conclusion of law.* In a bill by a city official seeking to restrain another claimant to the office held by complainant from interfering with complainant's performance of duty as such, an allegation that complainant's term of office as such official has not expired is a mere conclusion of law.

5. INJUNCTION, § 177\*—*how allegation as to nomination of another person for office by mayor construed.* In a bill by a city official to restrain another claimant to the office held by complainant from interference with complainant's performance of duty, an allegation that on a named date the mayor of such city nominated another person for the office held by complainant implies either that such mayor had attempted to remove complainant or that such mayor considered that complainant's term had expired.

6. MUNICIPAL CORPORATIONS, § 112\*—*when mayor right to appoint officer in place of removed officer.* Where the mayor of a city removes a city official appointed by him under the authority of section 7, art. II, part I, of the Cities and Villages Act (J. & A. ¶ 1291), such mayor has the right to appoint an officer to act for the time being, although such mayor has no power to appoint a successor to such official prior to filing his reasons and the action of the city council thereon as required by the statute.

7. INJUNCTION, § 177\*—*when bill to restrain removal of city official insufficient.* Even if it be held that a court of equity has jurisdiction to restrain the removal of a city official, a bill therefor cannot be entertained which does not show that the office held by complainant was duly established by ordinance, the nature and extent of complainant's right to hold the office, and the nature of the authority by which he was sought to be removed.

8. OFFICERS, § 2\*—*what is nature of office of city marshal.* The office of city marshal in a city is political in its character, being one of the agencies by which a city government is conducted.

9. EQUITY, § 1\*—*what equity will not interfere with.* Courts of equity will not take jurisdiction of political controversies or under-

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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take to control the government of the State, or of cities or other governmental agencies.

10. EQUITY, § 1\*—*what is subject-matter of jurisdiction of equity.* The subject-matter of the jurisdiction of courts of equity is civil property, and the injury thereto, actual or prospective, and such courts have jurisdiction of matters of a political character only under special circumstances where such jurisdiction is necessary in order to protect rights of property.

11. EQUITY, § 1\*—*when no jurisdiction over appointment and right of officers to office.* Disputed questions concerning the appointment of civil officers and of their right to hold office as such are of a nature purely legal and cognizable only by courts of law.

Appeal from the City Court of Aurora; the Hon. EDWARD M. MANGAN, Judge, presiding. Heard in this court at the October term, 1915. Reversed and injunction dissolved. Opinion filed December 27, 1915.

JOHN K. NEWHALL, A. J. KELLEY and CHARLES O'CONNOR, for appellant.

ALSCHULER, PUTNAM & JAMES, MIGHELL, GUNSUL & ALLEN and MURPHY & LYON, for appellee; GARNSEY, WOOD & LENNON, of counsel.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

On November 2, 1915, Frank Michels filed in the City Court of Aurora a bill of complaint against Charles S. McCarty for an injunction, and on said day an injunction was issued as prayed in said bill, and without notice, and said injunction was served on that day. Defendant moved to dissolve the injunction for various reasons, among which were that there was no equity on the face of the bill; that the court had no jurisdiction of the subject-matter; that complainant had an adequate remedy at law; and that the relief prayed is political in its character and not for the protection of property rights. Defendant also filed a demurrer to the bill. On November 5th the court denied the motion to dissolve the injunction and over-

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ruled the demurrer to the bill. Defendant prayed and was allowed an appeal to this court from the order denying the motion to dissolve the injunction. Pursuant to that order he filed an appeal bond, which was approved on the same day, and which recited an appeal both from the order granting the injunction and from the order denying the motion to dissolve. The cause was submitted at this term, pursuant to the statute, requiring us to give such an appeal precedence over other causes in this court.

The bill alleges that Michels is a resident, citizen, taxpayer and qualified elector of the City of Aurora; that for seventeen years he has been city marshal and chief of police of the City of Aurora, and is now occupying that office, and discharging the functions and duties thereof; that no proceedings have been filed before any lawful authorities asking for his removal or suspension from office, and that no action has been taken by any duly constituted authority looking to his suspension or removal from said office; that no order has been made by any authority directing him to turn over the property in his possession as such officer, and that his term of office has not expired; that though he is the lawful holder of said office, the mayor, at a council meeting on November 1, 1915, illegally appointed McCarty chief of police, and submitted that appointment to the city council, and it voted not to confirm the appointment; that later on the same day the mayor unlawfully appointed McCarty acting chief of police or chief of police *pro tem*, which said office was not vacant or open to appointment by the mayor, but was lawfully held by Michels. The bill further alleges that by virtue of such appointment McCarty claims to be city marshal and chief of police of said city, and attempts, seeks and threatens to intrude himself into said office, and to hinder and prevent Michels from discharging the duties of said office; that McCarty has not established his title to said office

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in any court or before any civil service commission or other legally constituted municipal or governmental body; that McCarty will carry out his threats and intentions of usurping said office and interfering with and preventing Michels from performing the duties thereof unless immediately restrained by injunction, and that McCarty will thus inflict irreparable injury upon Michels. There are allegations of the existence of crime and disorder in Aurora, and of the dangers thereof, and of the special need the citizens have that Michels shall have charge of the police department, but there are no facts stated which tend to show that law and order will not be duly enforced by McCarty, and we consider such allegations of crime and disorder in Aurora immaterial. In oral argument, reference was made to the act to regulate civil service in cities. We find no allegation in the bill that this act has ever been adopted by the City of Aurora, nor anything from which it can be determined that if so adopted it would apply to the city marshal or chief of police. We infer that the terms "city marshal" and "chief of police," as used in this bill, describe the same office.

Under section 6 of article I of the Act for the incorporation of cities and villages (J. A. ¶ 1276), we are required to take judicial notice that the City of Aurora is organized under said general law. Section 2 of article VI of that Act (J. & A. ¶ 1345) authorizes the city council by ordinance to provide for election by the legal voters or for appointment by the mayor, with the approval of the city council, of a city marshal; and also, by an ordinance or resolution to take effect at the end of the fiscal year, to discontinue such office, and to devolve its duties on any other officer. Section 3 of article VI (J. & A. ¶ 1346) authorizes the city council by ordinance to fix the term of office of the city marshal. It is there enacted that where not otherwise provided, officers shall be appointed by the mayor, and vacancies shall be filled by the mayor with the

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consent of the city council. Section 7 of article II of that Act (J. & A. ¶ 1291) authorizes the mayor to remove any officer appointed by him. He is required to report his reasons for such removal to the city council within ten days thereafter. The officer thereby stands suspended, and is restored to office only if the mayor fails to file such reasons with the city council within the time limited, or if the city council by a two-thirds vote shall disapprove of the removal. *Heffran v. Hutchins*, 160 Ill. 550. If the mayor files his reasons within the time limited and the council do not disapprove of the removal by a two-thirds vote, the officer stands removed.

The allegations of this bill are vague and general, and are in various respects conclusions of law, and not allegations of fact as correct equity pleading requires. The bill does not advise the court whether the office in question was ever established by any ordinance, nor whether any term of office has been fixed for such office, nor what that term, if any, was. There is no statement whether Michels was elected by the people or appointed by the mayor with the consent of the council. If he was appointed by the mayor, there is no statement when he was last so appointed, nor when he was last confirmed, nor when he last gave bond and took the oath of office required by another section. The allegation that his term of office has not expired is a mere legal conclusion, and the facts upon which that allegation is based are not stated, and the court has no means of ascertaining from the bill whether his conclusions as to the law upon the subject of his term of office are well or ill founded. He does not aver that he has not been removed from the office of city marshal or chief of police, but only that no action has been taken by any duly constituted authority looking to his suspension or removal. The implication is that an attempt has been made in some way to suspend or remove him, but that such action was

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not taken by the person or body whom he considers a duly constituted authority to take that action. It may be that the mayor did in fact undertake to remove him on the last day of October, 1915, but that it is his opinion that the mayor has no authority to do so. The fact that the mayor on November 1st nominated another person for the position implies either that there had been some attempt by the mayor to remove him or that the mayor considered that his term had expired. If the mayor undertook to remove Michels on the last day of October, while he did not thereby acquire power to appoint a successor, he no doubt did have the power to appoint an officer to act for the time being, and could, within ten days after the last of October, file his reasons for the removal with the city council, and Michels would not be again restored unless the mayor failed to file such reasons within ten days or the city council, by a two-thirds vote, refused to approve the removal; and such ten days within which he could file his reasons had not expired when this appeal was perfected in the court below. All of this could have occurred, and still every fact averred in this bill be true, if it is the legal opinion of Michels that the mayor was not the duly constituted authority who had power to take such action. This is but an illustration of the meagerness of the allegations of this bill. There being no showing in this bill that any ordinance was ever passed establishing this office, nor, if so, whether it was required to be filled by an election by the people or by an appointment by the mayor, nor any showing when Michels' last term of office began, nor for how long a period it legally existed, nor any allegation that he has not been removed by some show of authority, nor any statement by what pretended authority, if any, he has been removed, we are of opinion that if a court of equity has jurisdiction to grant an injunction to prevent the removal of a city marshal until the

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title of some one else to the office has been established, still this bill would not justify such an injunction.

The office of city marshal is political in its character and is one of the agencies by which the government of the city is conducted. It is well settled that courts of equity will not take jurisdiction of political controversies nor undertake to control the government of the State or of cities or other governmental agencies. It will be instructive to consider some of the cases in which the Supreme Court of this State has applied this doctrine. In *Delahanty v. Warner*, 75 Ill. 185, Delahanty filed a bill in equity in which he alleged that he was superintendent of streets of the City of Peoria and had been unlawfully removed from his office, and he sought an injunction to restrain the mayor and aldermen from appointing his successor and from interfering with him in any way in the discharge of his duties as such officer. A temporary injunction was dissolved and the bill was dismissed for want of equity. The Supreme Court affirmed that ruling, and said that his remedy was complete at law, and that if he had not been properly removed and if a successor could not therefore be legally appointed, that question could be settled by an action at law against the person claiming to be his successor in office; and also that if by the action of the mayor and aldermen he was unlawfully deprived of any fees and emoluments pertaining to said office, he had a complete remedy therefor at law. In *Sheridan v. Colvin*, 78 Ill. 237, an election had been held for the reincorporation of the City of Chicago, and that election had been decided in favor of reincorporation under the general act, and the city council had passed and the mayor had approved an ordinance for the reorganization of the police department, but there was pending a suit at law to determine the validity of said election. Sheridan and others were police commissioners up to the time of said alleged new incorporation, and they filed a bill in equity

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against the mayor, the city council and other officers to restrain all acts under said ordinance, on the ground that they possessed the only authority to control the police force and the public property belonging to the police department. A temporary injunction was issued pursuant to the prayer of the bill, but it was afterwards dissolved and the bill was dismissed, and the commissioners appealed. Three questions were presented and discussed, the third of which was whether a court of equity had jurisdiction to interfere with the action of the city council. The Supreme Court held that a court of equity had not that power; that the subject was purely political; that the subject-matter of the jurisdiction of courts of equity is civil property; that injury to property, actual or prospective, is the foundation on which the jurisdiction rests; that matters of a political character do not come within the jurisdiction of a court of equity, and that such court cannot interfere with the public duties of any department of government except under special circumstances and where necessary for the protection of rights of property. The court there quoted with approval from *High on Injunctions* to the effect that a court of equity is not the proper tribunal for determining disputed questions concerning the appointment of public officers or their right to hold office, such questions being purely of a legal nature and cognizable only by courts of law; and that equity will not interfere by injunction to restrain persons from exercising the functions of public officers on the ground of the illegality of the law under which their appointments were made, but will leave that question to be determined by a legal forum; and that a temporary injunction until the question of the validity of the law which defendants claim office can be determined will be dissolved. In *Dickey v. Reed*, 78 Ill. 261, which related to the same election as the case last referred to, an injunction had been issued upon another bill in equity



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attacking said election, and the city council had been enjoined from canvassing the returns of the election. That injunction had been violated, and certain members of the city council had been fined for such contempt, and had appealed. It was held that elections belong to the political branch of the government and are beyond the control of the judicial power; that it was not designed by the constitution that either department of government should interfere with or control the other; that it was for the political power of the State, within the limits of the constitution, to provide how elections should be held, and how those elected should qualify and how their elections should be contested; and that a court of equity had no power to hear and adjudicate in that class of cases, and that the defendants were not guilty of contempt because the writ was void for want of power. In that opinion many illustrations are given to show how harmful the exercise of such jurisdiction might be made, and how greatly it might interfere with the function of government. *Burgess v. Davis*, 138 Ill. 578, was a bill by a citizen and taxpayer to prevent the payment of a salary to a person acting as judge of the County Court of Cook county, on the ground that by certain action he had taken he had vacated that office and was no longer lawfully in possession thereof. The court below dismissed the bill. The Supreme Court reiterated the doctrine that courts of equity will not interfere by injunction to determine questions concerning the appointment or election of public officers or their title to office, and will not interfere to enjoin the payment of salaries to *de facto* incumbents, and will not disturb a *de facto* incumbent in the receipt of the fees of the office, and have no jurisdiction on that subject. The two cases of *Fletcher v. Tuttle* and *Blair v. Hinrichsen*, 151 Ill. 41, were bills in equity attacking the validity of a certain act of the Legislature, and seeking to enjoin an election and other proceedings

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thereunder. The Supreme Court said the entire object of both bills was the assertion and protection of political rights as distinguished from civil, personal or property rights. It was held that matters of a political character do not come within the jurisdiction of courts of equity, and that a court of equity has no jurisdiction to restrain an officer from the exercise of political powers. Reference was there made to *State of Georgia v. Stanton*, 6 Wall. (U. S.) 50, where it was held that the bill in equity there filed called for the judgment of the court upon a political question, and would not be entertained by a court of equity. The court also there referred to *In re Sawyer*, 124 U. S. 200, where it was held that the Federal Court had no jurisdiction to entertain a bill in equity to restrain a mayor from removing a city officer. The court there said that unless enlarged by express statute, the office and jurisdiction of a court of equity are limited to the protection of rights of property, and that it has no jurisdiction over the appointment and removal of public officers, and that to assume jurisdiction over the removal of public officers is to invade the domain of the courts of common law or of the executive and administrative departments of the government. The Supreme Court of Illinois then proceeded to reassert that wherever there are established distinctions between equitable and common-law jurisdictions, courts of equity have no authority or jurisdiction to interpose for the protection of rights which are merely political and where no civil or property right is involved, but the remedy must be sought in a court of law; that the matters involved in that case pertained solely to the political administration of government, and if the public officer charged with political administration has disobeyed the law, the party injured or threatened with injury had his remedy in a court of law and not in a court of equity. In *Heffran v. Hutchins*, *supra*, Heffran had been chief of the fire department, and his term of office

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had expired, and the mayor had appointed other parties who had not been confirmed by the city council, and Heffran had held the office thereafter for a year, and the mayor again made several appointments which the city council rejected, and he then removed Heffran and directed him to vacate the office and to turn over the property of the department to a subordinate officer, and threatened to eject him if he refused to comply. Heffran then filed a bill in equity and obtained an injunction restraining the mayor from removing or interfering with him in the office, and that injunction was modified so as to restrain the mayor from interfering with Heffran in his office until he should be lawfully removed or his successor appointed and qualified. That decree was made perpetual, and an appeal to this court resulted in its reversal with directions to dismiss the bill (56 Ill. App. 581), and from the latter judgment the case came to the Supreme Court. It was there held, as already suggested, that the removal by the mayor took effect at once, and remained in force unless the mayor failed to file charges within the time limited or the city council by a two-thirds vote disapproved of the removal, and it was held that he could not act after such removal until those proceedings had been had, and that he should have complied with the order directing him to turn over the property to another, and he no longer had any right to discharge the functions of the office. It was there further held that a court of equity had no jurisdiction to interfere with the public duties of the departments of government, but only to maintain property rights as distinguished from political rights, and that it had no jurisdiction to determine political questions between the mayor and the council of a city concerning the appointment and removal of officers, nor to determine the right of a party to an office. In many respects this case applies closely in principle to the matter now before us. A leading case on this subject is *Marshall v. Illinois State Reformatory*, 201 Ill. 9. Marshall had been ap-

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pointed physician of the reformatory, and it was held that that was a public office. The act under which he was appointed gave the board of managers power to remove him for cause, after opportunity given to the officer to be heard upon written charges. A complaint in writing was preferred against Marshall to the board of managers, charging him with certain neglect of duty, and he was notified to appear before the board on a certain day to answer the charges. On the day preceding the time so fixed he filed a bill in equity to enjoin the board from removing him from that office, and he therein alleged that said charges were not made in good faith, and that a quorum of the board had conspired to illegally remove him from office. He had a temporary injunction, which was dissolved and the bill dismissed for want of equity, and that decree was affirmed by this court. 103 Ill. App. 65. The Supreme Court on a further appeal said that the title to a public office and the right to exercise its functions cannot be determined by a court of equity unless expressly authorized by statute. The court there quoted, with approval from *In re Sawyer, supra*, that a court of equity has no jurisdiction over the appointment and removal of public officers, but that jurisdiction belongs exclusively to courts of law, and pointed out various methods by which a legal remedy can be had; and the Supreme Court said that matters of a political character do not come within the jurisdiction of a court of equity. *People ex rel. v. Rose*, 211 Ill. 252, was an action at law concerning a certain office and an election to fill the same, and it was argued that the writ of mandamus there sought from the Supreme Court should be granted because an injunction had been issued in equity by a Circuit Court restraining the Secretary of State from doing certain things. The Supreme Court said in effect that little attention need be paid to said injunction proceeding, because the rights involved were purely political rights, and that the

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jurisdiction of courts of chancery is confined to questions arising relative to property rights or civil rights, and that the mere right to office or the acts of public officers in the discharge of their official duties cannot be regulated or controlled by writ of injunction, and any order of the Circuit Court upon such a question would be void for want of jurisdiction of the subject-matter. In *Lavin v. Board of Commissioners of Cook County*, 245 Ill. 496, which was a bill in equity in which the Appellate Court had reversed the decree of the Circuit Court so far as it granted an injunction against the paying of compensation to a person who claimed to have been performing the duties of a public office, the Supreme Court held that equity was not the proper forum to determine the questions involved, and would not interfere by injunction to determine questions concerning the appointment or election of public officers or their title to office, nor to enjoin a *de facto* incumbent of an office from performing its duties or receiving fees or salary therefore. In *People v. McWeeney*, 259 Ill. 161, which was a proceeding to attach for contempt defendants who had violated an injunction issued by a court of equity in a matter concerning the holding of a political convention, and in which the defendants were fined for contempt and appealed to the Supreme Court and the Supreme Court reversed the conviction, the court said that courts cannot be drawn into political contests of any sort or description unless required by statute, and that any injunction for the purpose of restraining or controlling acts of a political nature is void. That an office is not a matter of property, and does not confer a right of property upon the incumbent, and that an action involving the title to or possession of an office does not involve a right of property so as to give a court of equity jurisdiction, is indicated in several of the cases above cited.

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It appears that in some other jurisdictions equity will issue an injunction at the instance of the actual incumbent of an office to restrain an adverse claimant from interfering therewith until his title has been established at law. But the language of the Illinois statutes above cited is so positive and unequivocal that we conclude that such a rule cannot obtain in this state. Under the allegations and omissions of this bill, which is to be construed most strongly against the pleader, the act of the mayor in appointing McCarty chief of police *pro tem* on Nov. 1st, may well be treated as equivalent to removing Michels from that office, and terminating his right thereto unless either the mayor failed to file charges within ten days thereafter or the city council by a two-thirds vote disapproved of such removal; and *Heffran v. Hutchins, supra*, and *Delahanty v. Warner, supra*, are conclusive that in this State equity has no jurisdiction to enjoin the removal or to decide the controversy. Great confusion might result if a mayor were enjoined from enforcing his statutory authority until it was determined whether he was pursuing the precise course prescribed by law. The action invoked here could be carried to the length of causing a court of equity to assume the government of a city. Many situations can be supposed in which under such a rule a court of equity could be used to the great detriment of municipal and state governments. The illustrations given by the court in *Dickey v. Reed, supra*, to show the evil effects which might result from permitting such a jurisdiction in equity, can easily be very much enlarged.

We therefore are of opinion that the injunction was improvidently issued, and should have been dissolved. The order refusing to dissolve the injunction is therefore reversed and the injunction is here dissolved.

*Order reversed. Injunction dissolved.*

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**George W. Black, Appellant, v. George W. Brown,  
Appellee.**

**Gen. No. 6,146. (Not to be reported in full.)**

Appeal from the Circuit Court of Winnebago county; the Hon. ARTHUR H. FROST, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed December 27, 1915.

**Statement of the Case.**

Action by George W. Black, plaintiff, against George W. Brown, defendant, in the Circuit Court of Winnebago county, to recover for work done by plaintiff on an alleged public and private road at the request of defendant who was then acting as highway commissioner. It was stipulated that defendant contracted with plaintiff as a town official. The case was tried by the court without a jury, and there was a finding for defendant at the close of plaintiff's evidence. A motion for a new trial was overruled. From a judgment for defendant, plaintiff appeals.

FISHER & NORTH, for appellant.

E. P. LATHROP, ROBERT LATHROP and R. H. BROWN, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

**Abstract of the Decision.**

1. OFFICERS, § 55\*—*when not personally liable on contract.* A public officer making as such a valid and enforceable contract is not personally liable on such contract for the payment of the debt.

2. OFFICERS, § 55\*—*when public officer not personally liable on invalid contract.* A public officer who mistakes the law and makes an invalid contract does not incur personal liability thereon in the absence of fraud or of evidence that such officer intended to bind

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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himself personally on such contract, or that the person with whom such officer makes such contract supposed he was dealing with such officer as an individual, the person with whom the contract was made being presumed to know that such officer exceeded his powers in making the contract.

3. **PRINCIPAL AND AGENT, § 169\***—*what is distinction between personal liability of public agent and private agent on unauthorized contracts.* There is a distinction between the personal liability of an agent of an individual and that of a public agent in respect to contracts made on behalf of the principal without authority, in that the agent of an individual is personally liable thereon, being presumed to know the extent of his authority, while a public agent is usually not liable.

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**Henry Berg, Defendant in Error, v. George Michell,  
Plaintiff in Error.**

**Gen. No. 6,153.**

1. **AUTOMOBILES AND GARAGES, § 3\***—*when negligence in operation of automobile question for jury.* In an action for personal injuries alleged to be due to defendant's negligence in operating an automobile, *held* that the question whether defendant was negligent was a question of fact for the jury.

2. **AUTOMOBILES AND GARAGES, § 3\***—*when contributory negligence of person injured by automobile question for jury.* In an action for damages for personal injuries alleged to be due to the negligent operation of an automobile, *held* that whether plaintiff exercised due care was a question for the jury.

3. **APPEAL AND ERROR, § 1401\***—*when verdict will not be disturbed.* A verdict will be allowed to stand upon appeal where the evidence as to negligence and contributory negligence is doubtful, even though the Appellate Court might have reached a different conclusion on the facts, provided the record is free from errors of law.

4. **AUTOMOBILES AND GARAGES, § 1\***—*how Motor Vehicle Act construed relative to speed of automobiles.* Section 10 of the Motor Vehicle Act (J. & A. § 10010), regulating the speed at which persons may drive such vehicles on public highways, does not directly prohibit driving in excess of ten miles an hour on such highways, but does prohibit driving such vehicles at unreasonable speed on such highways, and makes the fact that such vehicles are so driven at a speed of more than ten miles an hour *prima facie* evidence of such unreasonable speed.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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5. AUTOMOBILES AND GARAGES, § 3\*—*when instruction on speed of automobiles erroneous.* In an action for personal injuries alleged to be due to defendant's negligence in driving a motor vehicle at an unreasonable speed on a public highway, striking plaintiff, and causing the injuries sought to be recovered for, an instruction stating the provisions of section 10 of the Motor Vehicle Act (J. & A. § 10010), prohibiting the driving of such vehicles at unreasonable speed on public highways and making the driving of such vehicles on such highways at a speed in excess of ten miles an hour prima facie evidence of unreasonable speed, and adding, "And the running of such automobile at a rate of speed in excess of ten miles an hour under the circumstances above stated is regarded by the law as negligence," *held erroneous.*

6. AUTOMOBILES AND GARAGES, § 1\*—*how Motor Vehicle Act construed relative to speed.* Section 10 of the Motor Vehicle Act (J. & A. § 10010), prohibiting the driving of motor vehicles on public highways at unreasonable speed, and making the fact that such a vehicle was so driven at a speed in excess of ten miles an hour prima facie evidence of unreasonable speed, differs essentially from section 24 of the Railway Act (J. & A. § 8836), prohibiting the running of trains through a city at a speed prohibited by a city ordinance, in that the fact of violation of such ordinance is thereby made negligence *per se* so that proof of the violation establishes negligence, it thus appearing that in framing such section 10 the Legislature did not intend to prohibit the driving of such vehicle at a rate of speed in excess of ten miles an hour, but merely to require a person driving at such rate of speed to show that such rate was not unreasonable.

7. AUTOMOBILES AND GARAGES, § 1\*—*when statute not violated by driving automobile at speed exceeding ten miles per hour.* Under section 10 of the Motor Vehicle Act (J. & A. § 10010), prohibiting the driving of motor vehicles on public highways at unreasonable speed and making the driving of such vehicles on such highway at a speed in excess of ten miles an hour prima facie evidence of unreasonable speed, driving a motor vehicle on such highway at a speed in excess of ten miles an hour will not be a violation of the statute and will not amount to negligence, where it appears that owing to the deserted condition of the streets at night, or the lack of traffic thereon, such speed is reasonable and proper and will not endanger life or limb or the property of any person.

8. EVIDENCE, § 279\*—*when X-ray photographs properly admitted.* In an action to recover for personal injuries sustained by being struck by defendant's automobile which was alleged to have been

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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negligently operated at the time of the accident, whereby plaintiff suffered a fracture of the bones of his leg, rule as to the evidence necessary to lay a foundation for the introduction of X-ray photographs considered, and such photographs *held* not erroneously admitted.

9. AUTOMOBILES AND GARAGES, § 3\*—*when instruction on measure of damages for injuries sustained sufficient.* In an action to recover for personal injuries sustained as a result of defendant's alleged negligence, an instruction as to the measure of damages and the evidence required to support the amount found, *held* not erroneous under the evidence.

Error to the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed December 27, 1915.

WEIL & BARTLEY, for plaintiff in error.

CAMERON & CAMERON, for defendant in error.

MR. JUSTICE CARNES delivered the opinion of the court.

Henry Berg, the plaintiff below, had a verdict against Dr. George Michell, the defendant below, of \$12,000, in a suit for damages for injuries sustained by the plaintiff who was struck while a foot passenger on a street in Peoria by an automobile driven by the defendant. The plaintiff remitted \$2,500 from the verdict, and the court entered judgment for \$9,500, from which the defendant prosecutes this writ of error. The declaration charged as negligence of the defendant in the first count negligent running of the automobile, in the second and third, running in the closely built up business portion of the city at a speed in violation of the motor vehicle statute; also charging in the third count failure to give warning by gong or otherwise of the approach of the automobile. The general issue was pleaded. It appeared that the plaintiff was at the time of the accident (August 5, 1912) in good health,

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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fifty years old, employed in a wholesale drug house in Peoria at \$11 a week; that he left his work about 6 p. m. and went to a saloon; and had two glasses of beer, then went to a carnival and stayed until ten o'clock, then started on foot for home, stopping at a saloon and drinking two more glasses of beer, and at another place purchasing a bag of peanuts. He proceeded to a street crossing and passed to the far side of the intersecting street to wait for a street car. He saw one that had approached on the same street and in the same direction that he had been walking, standing on the near side of the intersecting street to discharge and take on passengers. He walked diagonally across the intersecting street eating peanuts the while, to get a view of the sign in front of the car, then, discovering that it was not the one he wished to take, he passed by the front of the car and immediately after clearing the car tracks was struck by the automobile, knocked down, and dragged some distance. He did not see the automobile before it struck him, and the defendant did not see him before the collision. Both of the bones in his left leg were broken between the ankle and the knee, his head was bruised, and he was otherwise somewhat bruised and injured. The defendant stopped his automobile and took him to the hospital, where he appeared to be in an intoxicated condition. He was there cared for. The most serious injury was the fracture of the bones of the leg, and to procure a union the surgeons used metal plates fastened by metal screws to the bone above and below the break, and one of the plates was afterwards removed. He was about five months in the hospital, and suffered much pain.

There is much conflict in the testimony as to the permanent effect of the injury. Evidence was introduced sustaining the contention of the defendant that no very serious permanent injury resulted, and other evidence sustaining the contention of the plaintiff that

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the result was a very serious permanent disability. There was also a close question of fact whether at the time of the accident the plaintiff was intoxicated and not in condition to exercise proper care for his own safety. There is no direct evidence that he had drunk more or other intoxicating liquor than above stated, and he says he had not, but there is evidence that his condition when taken to a hospital indicated a degree of intoxication that would not have been produced by the amount of beer so taken. There is also a sharp conflict in the testimony whether the automobile was at the time running over ten miles an hour, and while it appears the horn was sounded as the automobile approached, there is some conflict about that. We will not attempt to analyze the testimony or express any opinion thereon further than to say there is much doubt whether the evidence warrants the conclusion that the automobile was at the time running at ten miles or more an hour, and whether the plaintiff was exercising reasonable care for his own safety. These were all questions for the jury, and their verdict might prevail and control even against our different conclusion from a reading of the record, if the record is free from error of law. But in this condition of the evidence a judgment should not be permitted to stand unless the record is free from such error. Section 10 of the Motor Vehicle Act of 1911 (J. & A. ¶ 10010) provides:

“No person shall drive a motor vehicle \* \* \* upon any public highway in this State at a speed greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person. If the rate of speed of any motor vehicle \* \* \* operated upon any public highway in this State where the same passes through the closely built up business portions of any incorporated city, town or village, exceeds ten (10) miles an hour \* \* \* such rate of speed shall be prima facie evidence that the person operating

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such motor vehicle \* \* \* is running at a rate of speed greater than is reasonable and proper having regard to the traffic and use of the way or so as to endanger the life or limb or injure the property of any person."

The statute does not directly prohibit driving in excess of ten miles an hour, but makes such driving *prima facie* evidence of unreasonable speed, which is prohibited. Plaintiff's given instruction No. 1 correctly informed the jury of this provision of law substantially in the language of the statute, but added: "And the running of such automobile at a rate of speed in excess of ten miles an hour under the circumstances above stated is regarded by the law as negligence."

This was error. The law does not regard that rate of speed as negligence, but as *prima facie* evidence of negligence; that is, when the higher rate of speed is shown it is not necessary to further show conditions that make that rate of speed unreasonable, but the law makers assumed that conditions might be such that the high rate of speed would not be unsafe and unreasonable and left the question of fact to be determined by a jury or other tribunal passing on the facts, with the burden of proof on the accused party. This motor vehicle statute is substantially different in effect from section 24 of our Railway Act (J. & A. ¶ 8836), which prohibits running a train through a city at a greater rate of speed than permitted by ordinance of such city; that is, in case of an ordinance limiting the rate of speed of a railway train to ten miles an hour, the running of one at a higher rate of speed is negligence *per se*, and proof of such excess speed establishes the negligence of the defendant. The language of the motor vehicle statute clearly indicates that the Legislature did not intend to prohibit a speed in excess of the rate there mentioned, but only to require a person exceeding that rate of speed to show that it was not unreasonable, etc. If the jury in this case believed

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from the evidence that the defendant was running eleven or twelve miles an hour, and further believed that because of the time of night and deserted condition of the street such rate of speed was not greater than is reasonable and proper, having regard to the traffic and use of the way, or so as to endanger the life or limb or injure the property of any person, then such rate of twelve miles an hour was not a violation of the statute and not something which the law regards negligence. We express no opinion whether driving at a rate of speed higher than ten miles an hour, if so found by the jury, was or was not negligence under all the circumstances shown by the evidence as to the surroundings, but only say that it was a question of fact for the jury, and it was by the instruction determined as a matter of law by the court. In other words, there is a material and marked distinction between saying that driving at the rate of twelve miles an hour is negligence and saying that driving at that rate may or may not be negligence, and putting the question to the jury to say whether or not, with the burden of proof on the defendant to show it is not.

X-ray pictures of the broken bones of the leg were exhibited to the jury. It is contended that there was insufficient evidence to permit their introduction under the rule in regard to the use of ordinary photographs on the trial of a cause, which has been held to be the proper rule (17 Cyc. 420, and authorities there cited). It is true that some, and perhaps all, of these X-ray pictures were calculated to shock a layman, and together with the fact that steel was used in getting a union of the bone, as before mentioned, might create an impression of much graver injury than a surgeon would understand existed from a consideration of the same facts, and it is quite likely that the exhibition of these pictures resulted in much increasing the size of the verdict, not because of any correct information they furnished the jury, but because of the shock pro-



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duced on their sensibilities. Still, we are not inclined to hold that there was error in permitting that testimony. The court gave the jury an instruction as to the measure of damages and evidence required to support their finding of the amount of damages that was proper, except for the fact that there was some testimony as to physicians' bills and expenses charged in the declaration that was capable of direct proof as to value. There was some confusion in the testimony as to the question of physicians' bills and expenses, it being asserted by defendant's counsel that the defendant paid the bills and there was no bill to be paid or liability incurred by the plaintiff. We do not think the court erred as to either of these matters under these facts. On another trial it will, we assume, appear more clearly whether a liability for those expenses does exist, and the evidence will be received and instructions given in accordance with what may there develop.

We are of the opinion that the ends of justice require another trial of this case. The judgment is therefore reversed and the cause remanded.

*Reversed and remanded.*

MR. JUSTICE NIEHAUS took no part.

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**The People of the State of Illinois, Defendant in Error,  
v. Edward Fichter, Plaintiff in Error.**

**Gen. No. 6,157. (Not to be reported in full.)**

Error to the County Court of Lake county; the Hon. PERRY L. PERSONS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed December 27, 1915.

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### Statement of the Case.

Prosecution by the People of the State of Illinois against Edward Fichter, defendant, in the County Court of Lake county, charging defendant with unlawfully keeping open a tippling house on Sunday. Defendant was regularly licensed to keep a bar in connection with a dancing pavilion, at which bar intoxicants were sold. It was admitted that on some Sundays defendant's place was kept open for the sale of tobacco and "soft drinks," including "near beer." The conviction was based on the testimony of two hired investigators, whose testimony was denied by defendant, corroborated by his bartender, and to some extent by another person. The case was tried by a jury.

To reverse a judgment of conviction with sentence to pay a fine of one hundred and fifty dollars, defendant prosecutes this writ of error.

A. L. TOMPKINS and GEORGE W. FIELD, for plaintiff in error.

R. J. DADY and E. M. RUNYARD, for defendant in error.

MR. JUSTICE CARNES delivered the opinion of the court.

### Abstract of the Decision.

1. WITNESSES, § 253\*—*when weight of testimony for jury.* Owing to the removal of many disqualifications of witnesses, such as being interested, many witnesses formerly barred are now heard, and the weight of their testimony is primarily to be determined by the jury subject to the approval of the trial court and that of a reviewing court.

2. WITNESSES, § 267\*—*how weight of testimony of detectives determined.* In a criminal case the testimony of private detectives employed and paid to secure evidence against defendant is to be considered and weighed like the testimony of other witnesses, with

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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a proper consideration of the influences under which such witnesses were acting.

3. **APPEAL AND ERROR, § 1404\***—*when verdict will not be set aside on appeal.* Since the jury and the trial court are more likely to judge correctly of the truth or falsity of the testimony of interested witnesses, a verdict based on such testimony will not be set aside by a reviewing court unless the finding is so palpably against the weight of the evidence as to indicate that the verdict is based on passion or prejudice.

4. **INTOXICATING LIQUORS, § 147\***—*when evidence sufficient to sustain conviction for unlawfully keeping tippling house open on Sunday.* In a prosecution for unlawfully keeping a tippling house open on Sunday, where the prosecuting witnesses were private detectives employed and paid to secure evidence against defendant, and where the evidence was conflicting, evidence held sufficient to warrant a judgment of conviction.

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**Edward Reeb, Appellee, v. M. A. Bronson, Appellant.**  
**Gen. No. 5,935.**

1. **PRINCIPAL AND AGENT, § 167\***—*when agent personally liable to third person for goods purchased.* Where a sale of goods is made to one who is known to be an agent for a principal, and for whom vendor supposes such agent is acting, but such agent has no authority to act and does not act for such principal in making the purchase, he is personally liable.

2. **TRIAL, § 155\***—*when province of jury to weigh conflicting evidence.* The determination of disputed questions of fact properly comes within the province of the jury.

3. **EVIDENCE, § 475\***—*what constitutes preponderance.* In an action to recover for goods sold and delivered, where defendant denied that a sale was made as alleged, evidence held fairly to preponderate in plaintiff's favor, plaintiff being sufficiently corroborated by other witnesses and by the circumstances of the case.

4. **ASSUMPSIT, ACTION OF, § 89\***—*when necessary to show delivery of goods sold.* In an action for goods sold and delivered where recovery is based on the common counts, the evidence must show a delivery of the goods alleged to have been sold.

5. **ASSUMPSIT, ACTION OF, § 89\***—*when evidence sufficient to show delivery of goods.* In an action to recover for goods sold and delivered.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ered where plaintiff declares on the common counts, a delivery of the goods alleged to have been sold is shown where it appears that plaintiff hired a drayman to haul the goods to and to load them in a freight car procured by defendant for the transportation of the goods, and where defendant paid the charges of such drayman for such hauling and loading.

6. SALES, § 126\*—*what constitutes delivery of goods.* A vendee of goods is placed in actual possession of such goods so as to constitute a delivery where it appears that such goods are placed in the direct control of such vendee.

7. PRINCIPAL AND AGENT, § 183\*—*when purchaser of goods ratifies act of seller in employing drayman.* A vendee of goods by paying the charges of a drayman employed by vendor, who hauls and loads such goods into a car engaged by defendant for the transportation of such goods thereby ratifies the act of vendor in employing such drayman to haul and load such goods.

8. SALES, § 126\*—*what constitutes delivery of goods.* Actual delivery consists in giving to the buyer, or his servants, or accredited agent, the real possession of the goods sold.

9. SALES, § 126\*—*when evidence sufficient to establish delivery of goods.* In an action to recover for goods sold and delivered, evidence held sufficient to establish the fact of a delivery to the vendee of the goods sold.

10. PRINCIPAL AND AGENT, § 249\*—*when instruction as to personal liability of agent making sale without authority correct.* In an action to recover for goods sold and delivered where defendant was local manager for a brewing company, and where the goods alleged to have been sold consisted of the stock of a saloon, an instruction as to the personal liability of defendant as agent for selling goods without authority, approved.

11. PRINCIPAL AND AGENT, § 169\*—*when agent personally liable to third person on contract.* If a person undertakes to contract for an individual or corporation and contracts in a manner not legally binding on his principal, the person so undertaking to contract is personally liable on such contract.

12. PRINCIPAL AND AGENT, § 225\*—*when burden on agent to show authority to bind principal.* An agent who makes a contract on behalf of a principal can exonerate himself from personal liability on such contract only by showing affirmatively that he has authority to bind such principal by the contract made, and it is not incumbent on the person with whom the contract is made to show that such agent had not such authority.

13. PRINCIPAL AND AGENT, § 249\*—*when instruction as to authority of agent properly modified.* In an action to recover for goods

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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sold and delivered where defendant was local manager of a brewing association, where it was undisputed that defendant had no authority to purchase the goods for his principal, an instruction in reference to such authority *held* properly modified.

14. INSTRUCTIONS, § 120\*—*when instruction not based on issue or evidence properly refused.* In an action to recover for goods sold and delivered, where a count presenting the issue as to whether or not plaintiff contracted with defendant as agent for a brewing association, under representation of defendant that he had authority to so contract, had been stricken from the files at the close of plaintiff's evidence, and where there was no evidence on such issue, an instruction on such issue *held* properly refused.

15. APPEAL AND ERROR, § 1514\*—*when improper remarks of counsel harmless error.* In an action to recover for goods sold and delivered, remarks of counsel in final argument, an objection to which was sustained by the trial court, *held* improper but not of such a prejudicial character as to have influenced the jury in deciding the merits of the case.

16. INTEREST, § 23\*—*when interest not allowed on ground of unreasonable and vexatious delay in payment.* Where the right to recover is disputed both on the facts and on the law, the case is not a proper one for the allowance of interest on the ground of an unreasonable and vexatious delay in payment, if it is clear that the delay was due to the defense made to the action.

17. INTEREST, § 24\*—*what does not constitute unreasonable and vexatious delay.* The right to appear and defend a suit is one which cannot be construed into an unreasonable and vexatious delay without impairing the right.

18. INTEREST, § 24\*—*what does not constitute unreasonable or vexatious delay in payment.* Mere failure to pay a demand will not necessarily constitute the delay in payment unreasonable or vexatious.

19. INTEREST, § 25\*—*when question of what constitutes unreasonable or vexatious delay in payment not for jury.* Where the only delay in payment of a demand is that occasioned by defending the action, the question of the allowance of interest for an unreasonable and vexatious delay in payment is not a question for the jury and should not be submitted to them.

20. APPEAL AND ERROR, § 1659\*—*when remittitur cures error in judgment.* Where a judgment is erroneous in that it includes interest which plaintiff is not entitled to recover, the entry of a remittitur for the amount of such interest cures the error.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Appeal from the Circuit Court of Livingston county; the Hon. G. W. PATTON, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed December 27, 1915.

BOYS, OSBORN & GRIGGS, for appellant.

NORTON & ORTMAN and C. H. THOMPSON, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

In this case an appeal was taken by the appellant, M. A. Bronson, from a judgment for \$341.23, rendered against him in assumpsit, in favor of the appellee, Edward Reeb, in the Circuit Court of Livingston county. The suit was commenced by appellee to recover for the remnants of a stock of liquors and cigars which the appellee had carried in the saloon business conducted by him in the Village of Dwight. The saloon fixtures which the appellee had used in the business were owned by the Anheuser-Busch Brewing Association, and the appellant was the agent of this association, with headquarters at Streator, Illinois.

The appellant came to Dwight, with a man by the name of Shanley, on April 18, 1907, two days after the village election which had resulted in making Dwight dry territory, and had limited the time in which appellee could operate his saloon to May 10th, the date of the expiration of his dramshop license. Appellant, as agent of the Anheuser-Busch Brewing Association, had been trying to assist Shanley to get started in the saloon business at Ottawa, Illinois, within the territory controlled by his agency; and he wanted to get, for Shanley, a set of saloon fixtures. Having failed to get a new set of fixtures for Shanley from the Anheuser-Busch Brewing Association, he had come to Dwight, on the day in question, to see about procuring the fixtures which had been in use by appellee.

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Appellee asserts, in his testimony, that appellant and Shanley were desirous of getting the fixtures by May 1st, that is to say, ten days prior to the time limit of his license and business, and that he told appellant, who was acting in this matter as agent of the brewing association, that he would not be willing to let him take the fixtures before the 10th of May, unless appellant would also take the remnants of his stock of goods on hand, which he was willing to sell at the cost price; that appellant, upon being informed by appellee's bartender that these remnants of his stock would not exceed in cost the sum of \$300 or \$400, agreed to take them at the invoice prices; that appellee inferred, from the fact that appellant was representing the Anheuser-Busch Brewing Association as agent in the procuring of the fixtures, he was also acting for the association in the purchasing of the liquor and cigars, and was purchasing them for the brewing association, but that appellant did not make any representation to him to the effect that he had authority from the brewing association to purchase the goods.

Appellant denies that the transaction concerning the alleged sale to him occurred, and there is a conflict of evidence on this question in the case. If the sale was made to appellant, as testified to by appellee, then it was a sale to the appellant, for which he was personally liable. It is not contended in this case, by appellant, that he purchased these liquors for the Anheuser-Busch Brewing Association, nor, that he was acting under any authority from the association, for that purpose, or that as agent generally, he had any authority to purchase these goods, and he testified expressly, that as agent he had no authority to make a purchase of this character. His defense was, that there was no sale made to him at all, which leaves the question as to whether or not there was such a sale made the only real issue in the case. The disputed question is one of fact, and properly comes within the province of the



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jury for determination; and the jury did determine it, by their verdict. It may be further said, that while the appellant denies that he had the conversation with appellee, which appellee claimed resulted in a sale, yet the appellee is sufficiently corroborated by other witnesses, and the circumstances surrounding the transaction, as to make the whole evidence concerning the matter fairly preponderate in appellee's favor.

It is true, as a legal requirement, that inasmuch as the recovery in this case is based on the common counts, it is necessary that the evidence should show a delivery of the goods alleged to have been sold to appellant; and we think the evidence does show such delivery. It appears from the evidence that the fixtures, as well as the goods in controversy, had been hauled and placed by a drayman whom appellee had hired for that purpose, in a C. & A. freight car which had been engaged by appellant from the railroad company, and which had been provided for him by the railroad company, to carry freight to Ottawa, Illinois; and it also appeared from the testimony of the drayman that while the appellee hired him, the appellant paid him, not only for hauling the fixtures, but also for hauling the goods, and paid the drayman after he had been informed by him that the goods had been hauled, and put into the car, as well as the fixtures. The goods and the fixtures, therefore, were placed directly within the control, and thereby into the actual possession of the appellant, by the appellee, and appellant by paying the charges for this service, ratified the act of the appellee in employing the drayman to haul these goods, and to place them into the car.

“Actual delivery consists in giving to the buyer, or his servants, or accredited agent, the real possession of the goods sold.” (35 Cyc. 189.) Furthermore, after the goods in question came into appellant's possession and control, as stated, he made a disposition of them at Ottawa, by directing the drayman at Ottawa, whom

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he had employed, to take them out of the car and into the drayman's storehouse. We think the evidence in the case, both with reference to the sale and with reference to the delivery of the goods to appellant, clearly preponderates, to establish these two important facts in the case.

The giving of the second instruction is assigned as error by appellant. The instruction is as follows: "You are instructed that if you believe from the evidence that Bronson was the local manager of the Anheuser-Busch Brewing Association, at Streator, but as such, had no authority to buy goods for it, but that Reeb thought Bronson had that authority and sold him goods believing at the time he was selling to the Anheuser-Busch Brewing Association, through Bronson, as its agent, and if you further believe from the evidence that Bronson promised to pay for said goods, but did not say whether he was buying for Anheuser-Busch Brewing Association or not, and made no representations in regard thereto, but concealed his lack of authority to make the purchase for said Brewing Association, then, in that state of the evidence, Bronson was individually liable for such goods and it made no difference if Reeb thought at the time that he was selling to the Anheuser-Busch Association, through Bronson as its agent."

This instruction purports to state the law involved in this case, pertaining to the personal liability of appellant as agent, and states it accurately. The point presented by the instruction is well settled. Justice Sutherland, in the case of *Mott v. Hicks*, 1 Cow. (N. Y.) 536, clearly defines the rule concerning this feature of the personal liability of agents, as follows: "It is perfectly well settled, that if a person undertake to contract as agent for an individual or corporation, and contracts in a manner which is not legally binding upon his principal, he is personally liable. \* \* \* And the agent, when sued upon such a contract, can ex-

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onerate himself from personal liability only by showing his authority to bind those for whom he undertakes to act. It is not for the plaintiff to show that he had not authority. The defendant must show affirmatively that he had." The definition given is quoted with approval by our Supreme Court in *Wheeler v. Reed*, 36 Ill. 91; also in *Frankland v. Johnson*, 147 Ill. 525. The personal liability of agents under circumstances similar to this case was also affirmed in *Kadish v. Bullen*, 10 Ill. App. 566; *Rice v. Western Fuse & Explosive Co.*, 64 Ill. App. 603.

We think the court properly refused to give appellant's instruction No. 6, as presented, because under the facts as proven it was undisputed that appellant had no authority to purchase the goods in question; and if the goods were purchased by him, under these circumstances, he was personally liable therefor, even though he may have purchased them as agent. The modification made by the court was entirely proper and pertinent, and there was no error in giving the instruction as modified.

The court also properly refused appellant's instruction No. 18, because there was no evidence, and no issue in the case, upon the question whether or not the appellee contracted with appellant as agent of the Anheuser-Busch Brewing Association upon the appellant's representation that he was duly authorized to make the purchase in question, as their agent; the count of the declaration presenting such an issue had been stricken from the files, at the conclusion of the evidence for appellee, and was out of the case; and there was no evidence whatever, of any representation made by appellant or any authority as agent, to purchase the goods in question.

Error is also assigned on some of the remarks of appellee's attorney in his closing argument. These remarks were objected to by appellant, and they were improper, and the court sustained the objection. But

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the remarks, while improper, were not of such a prejudicial character that they could have unduly influenced the jury in arriving at a decision on the merits of the case.

This case, however, was not a proper one for the allowance of interest. There was no evidence of what legally would constitute an unreasonable and vexatious delay in making payment of the appellee's claim. The right of appellee to recover is a disputed matter, both as to the law and the facts involved, and it is evident that the delay in payment was occasioned by the defense made by appellant.

“To appear and defend a suit is a right which cannot be construed into ‘unreasonable and vexatious delay of payment,’ without impairing the right itself.” (*Aldrich v. Dunham*, 16 Ill. 404.)

Mere failure to pay a demand will not necessarily constitute the delay in payment unreasonable or vexatious. (*Pieser v. Minkota Milling Co.*, 94 Ill. App. 595.)

It is clear, therefore, under the state of evidence in this case, the allowance of interest was not a question for the jury, and should not have been submitted to them. (*Hatterman v. Thompson*, 83 Ill. App. 217; *Sammis v. Clark*, 13 Ill. 544; *Aldrich v. Dunham*, *supra*; *Franklin County v. Layman*, 145 Ill. 145; *Devine v. Edwards*, 101 Ill. 138.)

For the reasons stated, the appellee is not entitled to judgment for more than the amount of his claim, without interest, which is \$253.90; but having heretofore entered a remittitur to reduce the judgment to the amount above stated, the error in this regard is cured, and there is now no reversible error in this case, and the judgment should therefore be affirmed, in the sum of \$253.90 at the costs of appellee.

*Affirmed.*

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Kammerer v. U. S. Silica Co., 196 Ill. App. 527.

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**Christ Kammerer, Appellee, v. United States Silica Company, Appellant.**

**Gen. No. 6,092. (Not to be reported in full.)**

Appeal from the Circuit Court of La Salle county; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed December 27, 1915.

**Statement of the Case.**

Action by Christ Kammerer, plaintiff, against the United States Silica Company, defendant, in the Circuit Court of Lake county to recover for breach of the covenants of a lease of real estate.

From a judgment for plaintiff for \$125, after trial by jury on appeal from a justice of the peace, defendant appeals.

It appears from the evidence that the defendant on February 26, 1914, leased to the plaintiff the land in question, by a written lease. The term which was from March 1, 1914, to February 28, 1915, and which contained a provision by which the defendant reserved the privilege at any time to enter the property for certain purposes, and also the further stipulation that plaintiff should not hold the defendant liable for any damages as a result of the occupation of portions of the property by the defendant, for the purposes named.

The land in question, which was situated about two miles from the City of Ottawa, was known as sand land; and could also be used for pasture. There was a dwelling house on the land. The plaintiff from obtaining his lease from the defendant paid the first instalment of rent, and on the commencement of his term endeavored to take possession of the premises, but found another person in possession who claimed that he had a prior lease from the defendant, and refused to surrender possession. Plaintiff had come there with his household goods and effects, which he

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wanted to install upon the premises, and being thus prevented from entering was forced to rent other premises of a different kind and in a different locality.

McDOUGALL & CHAPMAN, for appellant.

H. M. KELLY, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

### Abstract of the Decision.

1. LANDLORD AND TENANT, § 161\*—*when lessee entitled to possession.* Where a lessee is in possession of premises under an oral lease, the legal as well as the actual possession of such premises is in such lessee.

2. LANDLORD AND TENANT, § 176\*—*what constitutes breach of implied covenant for possession and quiet enjoyment.* The covenant for possession and quiet enjoyment impliedly contained in a lease is breached where at the time when the lessee seeks to take possession of the demised premises another is in possession thereof under a prior lease.

3. LANDLORD AND TENANT, § 191\*—*when questions as to existence of prior lease and possession by third person for jury.* In an action by a lessee to recover for breach of a lease, where the breach assigned is that plaintiff was prevented from taking possession of the demised premises by the fact that another was in possession thereof under an alleged prior lease from defendant, the questions whether there was such a prior lease and whether such other person was in possession thereunder are questions of fact for the jury.

4. ASSUMPSIT, ACTION OF, § 6\*—*when lies.* An action of assumpsit will lie to recover for a breach of the implied covenant of a lease for possession and quiet enjoyment of the demised premises.

5. LANDLORD AND TENANT, § 191\*—*what is measure of damages for breach of lease by lessor.* In an action by a lessee to recover for breach of the condition of a lease, the measure of damages is the difference between the rental value of the premises involved and the rent which lessee actually agreed to pay, together with such special damages as may have been directly and necessarily occasioned to plaintiff by defendant's wrongful act, but not including what plaintiff might have made on the premises during the

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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lease, or loss sustained by being compelled to sell his stock, agricultural implements, etc., for less than their value.

6. TRIAL, § 276\*—*when interrogatories as to rental value of land erroneous.* In an action by a lessee to recover for breach of the condition of a lease, where the breach assigned is that plaintiff was prevented from taking possession of the demised premises by the fact that another was in possession under an alleged prior lease from defendant, and where plaintiff's lease reserved the right to enter upon the demised premises to lay tracks and to mine silica, and that plaintiff should exonerate defendant from liability for damages in case the rights reserved should be exercised, interrogatories to the jury as to the rental value of the land not incorporating such reserved rights as elements of value, *held erroneous.*

7. LANDLORD AND TENANT, § 191\*—*when evidence as to rental value of house as distinct from land inadmissible.* It is error to permit the jury to consider evidence of the rental value of a house apart from the rental value of a tract of land on which the house is situated, in computing the rental value of the premises occupied in estimating damages for breach of an implied covenant of possession and quiet enjoyment.

8. INSTRUCTIONS, § 104\*—*when instruction as to amount of recovery erroneous.* An instruction that if certain facts are found the jury should find for plaintiff, "in such damages as it is proved under the instructions in this case he has suffered," is erroneous where no other instruction is given laying down a correct measure of damages.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



**CASES**  
**DETERMINED IN THE**  
**FOURTH DISTRICT**  
**OF THE**  
**APPELLATE COURTS OF ILLINOIS**  
**DURING THE YEARS 1914 and 1915.**

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**Ernest Smiley et al., by Nora Smiley, Appellees, v.  
Millard Barnes, Appellant.**

**(Not to be reported in full.)**

Appeal from the Circuit Court of Massac county; the Hon. WILLIAM M. CLEMENS, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed November 9, 1914. Rehearing allowed and opinion filed September 1, 1915. *Certiorari* denied by Supreme Court (making opinion final).

**Statement of the Case.**

Action by Ernest Smiley, Perry Smiley and Opal Smiley, by their next friend Nora Smiley, plaintiffs, against Millard Barnes, in the Circuit Court of Massac county, to recover for the death of plaintiffs' father. From a judgment for plaintiffs for \$3,000, defendant appeals.

The declaration in three counts, in substance, alleged that plaintiffs were minor children of the deceased, Will G. Smiley, who was a farmer deriving an income of about \$2,000 a year from his farm, by means of which he maintained plaintiffs in a liberal manner, and the deceased came to his death by reason of intoxicating liquor sold to him by defendant, who was alleged to be engaged in selling such liquor in Brookport, by reason of which liquor deceased became

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intoxicated and while intoxicated received injuries causing his death, injuring plaintiffs in their means of support. A fourth count contained substantially similar allegations, except that the income of deceased was alleged to be \$3,000 per year, derived from his farm and stock raising.

It appeared from the evidence in this case that Will Smiley, father of plaintiffs, was a farmer living near Brookport. That on September 27, 1912, he hauled a wagon load of railroad ties to Brookport and sold them and that after the making of the sale he visited defendant's saloon in Brookport and purchased a drink of whisky. Thereafter he drank four drinks of whisky and some beer at defendant's saloon and purchased half a pint of whisky that he took away with him, and that by three or four o'clock he was intoxicated and started home riding upon the running gears of his wagon. Afterwards he drank more liquor from the half pint purchased and became very badly intoxicated and drove his team at times at a very rapid gait. He had not gone far from Brookport before he fell from his wagon, but again recovered his place and after having driven a short distance further he again fell and at this time his legs caught over the hounds of the wagon, with his head and shoulders dragging on the ground, in which position he was dragged the distance of about ten feet, being at this time much intoxicated. He was carried to one side of the road. About ten o'clock at night a Mr. Edwards discovered him and tried to get him up, but Smiley made so much complaint of pain on being handled that Edwards threw his coat over him and left him alone, and he remained there all night. The next morning Smiley was carried to the home of Edwards. He was cold and sick and could not eat and in a short time his leg began to swell and he began vomiting, which continued until his death. There was no outward appearance of injury to the leg which had swollen very badly. His bowels and kid-

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neys were apparently so paralyzed that there was no operation from his bowels, and his urine in small quantities had to be removed by the use of a catheter. Purgatives were used for the bowels but without effect. Different doctors visited him but it seems that none of them were able to give him relief. On October 7th Smiley was taken with bleeding at the nose, which was treated by his physician who on October 9th found the hemorrhage of the nose very profuse and the vomiting almost constant. He plugged the posterior nares with adrenalin gauze but was unable to stop the hemorrhage and Smiley died on the morning of October 10th. There is no evidence or claim of Smiley having drank or procured the liquor at any other place than the saloon of the appellant, and in fact there is no dispute but that the liquors were procured at appellant's saloon, that he became very badly intoxicated, that the vomiting and retching and paralysis of the bowels and kidneys continued from that day until his death. It also appears from the evidence that deceased was of the age of about thirty-four years, and not in the habit of becoming intoxicated; that he was a healthy, able-bodied man, excepting a deafness which had been caused many years ago by cerebral meningitis, and was an active, energetic and reasonably prosperous farmer.

Two of the plaintiffs' physicians testified for plaintiffs that he died of alcoholism. The physicians testifying for defendant said that it could not be definitely told what caused the nose bleed without a post mortem examination. Upon cross-examination of the physicians offered by defendant they, or most of them at least, admitted that vomiting and retching might be the cause of the rupturing of the blood vessel; that increased pressure in the arteries would cause it, and that the obstructed condition of the bowels and kidneys would cause an increased pressure in the walls of the blood vessels, and some of them admitted that the meningitis with which the deceased was afflicted many

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years ago might produce a diseased condition of the blood vessels of the head, rendering them brittle and weakened and that in such condition the vomiting and retching, together with the increased pressure of the blood, might cause a rupture of the artery.

COURTNEY, HELM & HELM, F. P. DRENNAN and W. H. NELMS, for appellant.

GEORGE B. BAKER and FRED R. YOUNG, for appellees.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

### Abstract of the Decision.

1. INTOXICATING LIQUORS, § 228\*—*when evidence sufficient to show intoxication proximate cause of death.* In an action by minor children to recover for injury to their means of support by the death of their father, where such death was the result of personal injuries sustained by deceased while intoxicated as a result of drinking liquor sold to him by defendant, a saloon keeper, where it appeared that as a result of the injuries sustained deceased became sick and vomited and retched constantly, being unable to eat, and his kidneys and bowels being paralyzed, and suffering much pain, and so continued until his death, which was immediately caused by hemorrhage of the nose, evidence held to sustain a finding that the proximate cause of his death was intoxication.

2. INTOXICATING LIQUORS, § 247\*—*when question whether death due to intoxication for jury.* In an action by minor children to recover for injury to their means of support by the death of their father, which death was the result of personal injuries sustained by deceased while intoxicated, as a consequence of drinking liquor sold to him by defendant, a saloon keeper, the question of proximate cause held a question for the jury where it appeared that the immediate cause of death was hemorrhage of the nose, and where the evidence was conflicting whether such hemorrhage was caused by the sickness resulting from the intoxication, or from a weakened condition of the blood vessels of the head due to a previous attack of spinal meningitis.

3. NEGLIGENCE, § 48\*—*what constitutes proximate cause of injury.* The proximate cause of injury must be understood to be that which in a natural and continuous sequence, unbroken by any new or independent cause, produces the result and without which the event would not have occurred.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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4. INTOXICATING LIQUORS, § 245\*—*when verdict for loss of support not excessive.* In an action by three minor children to recover for injury to their means of support by the death of their father, where such death was the result of personal injuries sustained by deceased while intoxicated as a consequence of drinking liquor sold to him by defendant, a saloon keeper, a verdict for plaintiffs of \$3,000 *held* not excessive, where it appeared that plaintiffs were of the age which required education and the ordinary expenses of rearing them, and that deceased was an active and reasonably prosperous man, thirty-four years of age, with an earning power of \$1,500 a year, from which he properly supported and provided for plaintiffs.

5. APPEAL AND ERROR, § 1406\*—*when verdict will not be disturbed on ground of excessive damages.* A verdict will not be disturbed on the ground of excessive damages where it does not appear that the jury were influenced in assessing damages by sympathy, prejudice or some other improper motive.

6. INSTRUCTIONS, § 104\*—*when instruction as to amount of recovery not erroneous.* In an action to recover for death due to defendant's alleged wrongful act, an instruction containing a correct recital of the essential facts to be proven by plaintiffs in order to recover in the action is not open to criticism because it concludes: "Then the law makes it your duty to find said defendant guilty and assess plaintiffs' damages as explained in these instructions."

7. INTOXICATING LIQUORS, § 249\*—*when instruction as to proximate cause of death not erroneous.* In an action by minor children to recover for injury to their means of support by the death of their father, as a result of personal injuries sustained while intoxicated as a consequence of drinking liquor sold to him by defendant, a saloon keeper, where the immediate cause of death was hemorrhage of the nose, an instruction that, "If as a natural result of sales deceased became intoxicated and sickened, and that such sickness induced in him an increased strain upon the arteries of the body, whereby an artery was ruptured and he died therefrom, then such sales would be the proximate cause of his death, and this notwithstanding that there might have been at the time a diseased condition of his artery, which rendered it more liable to burst from increased pressure," *held* not improper as invading the province of the jury in determining the question of proximate cause, it appearing that deceased had at one time been afflicted with spinal meningitis, tending to harden the arteries of the head, and that defendant sought to show that the hemorrhage was caused by the weakened condition of the arteries, and the objection not being raised that the elements set forth in the instruction did not con-

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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stitute proximate cause and it not being pointed out how the jury could have been misled thereby.

8. INSTRUCTIONS, § 88\*—*when instruction on preponderance of evidence sufficient.* The use in an instruction of the words "however slight" in speaking of the preponderance of the evidence does not warrant a criticism of the instruction where the party objecting thereto admits that the use of the words, "if the evidence preponderated but slightly," in the instruction would have been good, there being no material difference between the expressions.

9. INSTRUCTIONS, § 89\*—*when instruction sufficiently refers to number of witnesses as basis for determining preponderance of evidence.* An objection to an instruction that it fails to mention specifically the number of witnesses as one of the things to be considered in determining the preponderance of the evidence is not well founded, where it appears from a reading of the whole instruction that the attention of the jury was called to the number of witnesses, among other things to be considered.

10. INTOXICATING LIQUORS, § 221\*—*when expert testimony unnecessary to determine proximate cause of death.* In an action by minor children to recover for injury to their means of support by the death of their father, which death was the result of personal injuries sustained by deceased while intoxicated as a result of drinking liquor sold to him by defendant, a saloon keeper, there is no necessity for proving the fact that the proximate cause of the death was the wrongful act of defendant by the expert opinion of doctors where the facts connecting the death with the intoxication can be proven by the persons who attended him.

11. INSTRUCTIONS, § 93\*—*when instruction that testimony of expert witnesses should be considered proper.* In an action where both sides introduce the testimony of physicians as expert witnesses, a requested instruction should be given advising the jury that the testimony of such witnesses as a class should be considered by the jury with all the other evidence in the case, although such instruction is faulty in calling the attention of the jury to a particular class of witnesses.

12. APPEAL AND ERROR, § 1560\*—*when refusal of instruction not prejudicial error.* The refusal to give a requested instruction that the testimony of physicians as expert witnesses should be considered by the jury with all the other evidence in the case is not prejudicial error, since the jury must have understood that they were to consider such evidence.

13. APPEAL AND ERROR, § 1525\*—*when imperfect instruction will not cause reversal.* Although the instructions given in a case may not be in every respect formal and accurate, yet where such instructions taken as a whole fully and fairly present the law of case to the jury, there is not such error as will justify a reversal.

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### On Rehearing.

INSTRUCTIONS, § 20\*—*when instruction that jury must not consider propriety of law upon which action based not misleading. An instruction in a civil action for damages for injury to means of support of children, owing to the intoxication of the father, that it is not for the jury to consider the propriety of the law in force relating to intoxicating liquors under which the action is brought, held not misleading.*

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### Nora Smiley, Appellee, v. Millard Barnes, Appellant. (Not to be reported in full.)

Appeal from the Circuit Court of Massac county; the Hon. A. W. LEWIS, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed November 9, 1914. Rehearing allowed and opinion filed September 1, 1915. *Certiorari* denied by Supreme Court (making opinion final).

### Statement of the Case.

Action by Nora Smiley, plaintiff, against Millard Barnes, defendant, in the Circuit Court of Massac county, to recover for injuries to plaintiff's means of support by the death of plaintiff's husband, Will G. Smiley, as the result of personal injuries sustained by deceased while intoxicated as a result of drinking liquor sold to him by defendant, a saloon keeper. The pleadings and evidence in this case were substantially the same as in that of *Smiley v. Barnes, ante*, p. 530, except that in this case such pleadings and evidence are adapted to the loss of deceased as the means of support of deceased's widow.

From a judgment for plaintiff for \$4,500, defendant appeals.

W. H. NELMS, F. P. DRENNAN and COURTNEY, HELM & HELM, for appellant.

GEORGE B. BAKER and FRED R. YOUNG, for appellee.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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MR. JUSTICE McBRIDE delivered the opinion of the court.

### Abstract of the Decision.

1. APPEAL AND ERROR, § 1502\*—*when not reversible error to refuse to permit peremptory challenge.* It is not reversible error to refuse to permit the peremptory challenge of a juror of a panel of four after such panel has been accepted and before the last panel of four has been accepted.

2. JURY, § 72\*—*when right to peremptory challenge does not exist.* After a panel of four jurors has been accepted, the right of peremptory challenge of jurors in the panel does not exist unless good cause is shown.

3. JURY, § 72\*—*when trial judge may permit peremptory challenge of juror.* Section 21 of the Jurors' Act (J. & A. ¶ 6851), providing that jurors shall be accepted in panels of four is not to be construed as restricting the right of the trial judge to permit a peremptory challenge of a juror of such panel after the panel has been accepted if deemed necessary or proper for the furtherance of justice, although such juror could not be challenged for any cause allowed by the statute.

4. APPEAL AND ERROR, § 1502\*—*when not reversible error to permit peremptory challenge of juror.* Section 21 of the Jurors' Act (J. & A. ¶ 6851), providing that jurors shall be accepted in panels of four, is directory and the exercise of discretion by the trial judge in permitting a peremptory challenge of a juror in such panel after the panel has been accepted will not work a reversal unless injustice has been done by the exercise of such discretion.

5. APPEAL AND ERROR, § 1502\*—*when failure to comply with statute in selection of jury not reversible error.* The selection of the jury is not in all cases required to be in strict pursuance with the statute, and such failure to observe the requirements of the statute strictly will not be deemed reversible error where it does not appear that the jury so selected were prejudiced against either of the parties or were not fair-minded and intelligent.

6. INSTRUCTIONS, § 19\*—*when not deemed argumentative.* The objection to an instruction that it is argumentative and misleading is not well taken where the objection is not pointed out, and it does not appear from a reading of the instruction objected to wherein such instruction is misleading or what constitutes the argument claimed.

7. INTOXICATING LIQUORS, § 251\*—*when instruction that jury must not consider propriety of law not prejudicially erroneous.* In an action by a widow to recover for injury to her means of support by the death of her husband, which death was the result of per-

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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sonal injuries sustained by deceased while intoxicated as a result of drinking liquor sold to him by defendant, a saloon keeper, an instruction that it is not for the jury in assessing damages to inquire into the propriety of the law in force in relation to the sale of intoxicating liquors, *held* not prejudicially erroneous although of doubtful propriety, the instruction not relating to exemplary damages, and the jury being expressly instructed to assess damages at the amount in which the evidence showed plaintiff had been injured in her means of support as a result of such death.

8. INSTRUCTIONS, § 104\*—*when instruction as to amount of recovery not prejudicially erroneous.* An instruction that if the jury find for plaintiff the damages assessed must be limited to the amount of the *ad damnum* is not prejudicially erroneous as not properly limiting the recovery, where the instructions as to damages properly define the elements on which plaintiff's damages are to be assessed, and where it appears that the verdict is for an amount less than half the amount of the *ad damnum*, it thereby appearing that the jury were not misled by the instruction complained of.

9. INTOXICATING LIQUORS, § 249\*—*when instruction as to cause of death not erroneous.* In an action by a widow to recover for injuries to her means of support by the death of her husband, such death being the result of personal injuries sustained by the deceased while intoxicated as a consequence of drinking liquor sold to him by defendant, a saloon keeper, an instruction is not subject to criticism where the word "contributed" is used instead of "materially assisted or contributed," in relation to the connection between the death sought to be recovered for and the intoxication produced by drinking the liquor sold to deceased by defendant, it not being denied that such intoxication was produced solely by such liquor, and the question of the contribution of defendant's wrongful act in causing such death being therefore not involved.

10. INTOXICATING LIQUORS, § 251\*—*when instruction properly limits damages to right of support.* In an action by a widow to recover for injury to her means of support by the death of her husband, an instruction objected to as not limiting plaintiff's damages to injury to her right of support, examined and *held* properly to limit such damages to the amount in which plaintiff was injured in her right of support.

11. INTOXICATING LIQUORS, § 251\*—*when refusal of instruction that loss of support of children not element of damages not reversible error.* In an action by a widow to recover for injury to her right of support by the death of her husband, it is not reversible error to refuse an instruction that loss of support of plaintiff's children was not an element of the damages to be assessed in this

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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action, although such an instruction might properly have been given.

12. **APPEAL AND ERROR, § 1406\***—*when verdict will not be disturbed on ground of excessiveness.* In an action by a wife to recover for injury to her right of support as a result of the death of her husband, the question of the amount at which plaintiff's damages is to be assessed is a matter for the determination of the jury, and the amount at which such damages were assessed by the verdict will not be interfered with where it does not appear that the jury in assessing damages acted from prejudice, sympathy or other improper motive.

13. **INTOXICATING LIQUORS, § 245\***—*when verdict in favor of widow for loss of support not excessive.* In an action by a widow to recover for injury to her means of support by the death of her husband, held that a verdict for plaintiff for \$4,500 should not be disturbed on the ground that the amount of damages assessed was excessive, where it appeared that deceased was a young and healthy man in the prime of life, and situated so as to give his family a comfortable living and properly to care for, maintain and educate his children.

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### Robert M. Hunt, Appellee, v. Illinois Southern Railway Company, Appellant.

1. **MASTER AND SERVANT, § 98\***—*how Federal Employers' Liability Act limited.* The application of the Federal Employers' Liability Act is limited to injuries occurring while the particular service in which the employee is engaged is a part of interstate commerce.

2. **COMMERCE, § 4\***—*what constitutes prima facie case that employee engaged in interstate commerce.* In an action under the Federal Employers' Liability Act, the fact that at the time of the injury sought to be recovered for, plaintiff was engaged in interstate commerce is prima facie proved by uncontradicted testimony that at such time plaintiff was engaged as employee of a railroad company in handling a train in which part of the cars were billed from a point in one State to a point in another State.

3. **MASTER AND SERVANT, § 537\***—*what counts declaration for damages for personal injuries sustained by employee engaged in interstate commerce may contain.* In an action by a freight conductor to recover for personal injuries sustained while handling one of defendant's trains, where a count of the declaration alleges facts sufficient as a basis for prima facie proof that at the time of the injury plaintiff was engaged in an interstate commerce

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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service, it is proper for plaintiff to include in his declaration counts alleging common-law negligence, a violation of a State statute and of the Federal Employers' Liability Act so as to meet the evidence which may be offered at the trial, since defendant may at any time by its records, or other competent evidence, rebut such prima facie case.

4. MASTER AND SERVANT, § 537\*—*when defendant need not object to declaration because containing several counts.* In an action by a freight conductor to recover for injuries, received while handling one of defendant's trains, defendant need not object to the declaration because it contains counts alleging common-law negligence, a violation of a State statute and of the Federal Employers' Liability Act.

5. MASTER AND SERVANT, § 706\*—*when question whether employee engaged in interstate commerce for jury.* In an action by an employee to recover for personal injuries where in different counts plaintiff alleges common-law negligence, a violation of a State statute and of the Federal Employers' Liability Act, the question whether plaintiff at the time of the injury was engaged in an interstate commerce service must be submitted to the jury like other questions of fact where such question is raised, there being no question of election of remedies in such case.

6. MASTER AND SERVANT, § 706\*—*when question whether employee engaged in interstate commerce for court.* In an action by an employee to recover for personal injuries, where in different counts plaintiff alleges common-law negligence, a violation of a State statute and of the Federal Employers' Liability Act, the question whether at the time of the injury plaintiff was engaged in an interstate commerce service is a question of law where it is not disputed that plaintiff was so engaged at such time.

7. MASTER AND SERVANT, § 98\*—*when Federal Employers' Liability Act affords exclusive remedy.* In an action by an employee to recover for personal injuries sustained while engaged in an interstate commerce service, the Federal Employers' Liability Act controls, and a recovery cannot be had at common law or under a State statute, the Federal act being exclusive, and not cumulative.

8. TRIAL, § 91\*—*when objection to admission in evidence of State statute based upon more than one ground.* In an action by an employee to recover for personal injuries where in different counts of his declaration plaintiff alleged common-law negligence, the violation of a State statute and of the Federal Employers' Liability Act, where defendant objected to the introduction of the State statute in evidence, "for the reason that those sections have no application to the case, and for the reason that this train was stopped and the engine cut off, etc.," held that the objection was

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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based on two grounds: (1) that the statute had no application, and (2) that the train was stopped and the engine cut off, etc.

9. MASTER AND SERVANT, § 599\*—*when State statute incompetent as evidence in action by servant for damages for personal injuries.* In an action by an employee to recover for personal injuries, where in different counts plaintiff alleged common-law negligence, a violation of a State statute and of the Federal Employers' Liability Act, and where there was no doubt of the application of the latter act under the evidence, *held* that an objection to the admission of the State statute in evidence should have been sustained, such evidence being incompetent as the statute had no application, the Federal act exclusively applying in such case.

10. TRIAL, § 247\*—*when verdict will be set aside because of instruction on bad counts.* The rule that a verdict will not be set aside when supported by one good count in a declaration does not apply where the court gives an instruction on bad counts which would authorize a verdict on such counts which would have been erroneous.

11. APPEAL AND ERROR, § 573\*—*when exceptions as to instructions preserved for review.* Exceptions not taken at the time of the giving of an erroneous instruction are preserved for review where the giving of such an instruction is assigned as error on a motion for a new trial.

12. APPEAL AND ERROR, § 1560\*—*when refusal of instructions not reversible error.* Where a declaration charging negligence contains both good and bad counts, the refusal of instructions to find defendant not guilty under the bad counts is not reversible error, although such instructions might properly have been given.

13. MASTER AND SERVANT, § 799\*—*when instruction on liability of master under Federal and State statute erroneous.* In an action by an employee to recover for personal injuries, where in different counts plaintiff alleged common-law negligence, a violation of a State statute and of the Federal Employers' Liability Act, and the application of the latter statute was clear under the evidence, an instruction that if the jury found that defendant had violated the State statute declared on and that such violation had caused the injury sought to be recovered for, a verdict of guilty might be found under the count charging such violation, *held* error since the jury might infer that if they found that defendant had not violated the Federal statute they might find defendant guilty if they also found that defendant had violated the State statute.

14. APPEAL AND ERROR, § 1478\*—*when admission in evidence of foreign laws reversible error.* In an action by an employee to recover for personal injuries, where in different counts plaintiff alleged common-law negligence, a violation of a State statute and

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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of the Federal Employers' Liability Act, and there was no doubt of the application of the latter act, the admission of evidence of the State statute declared on *held* reversible error.

15. MASTER AND SERVANT, § 770\*—*when not error to refuse peremptory instruction.* In an action by an employee against the master to recover for personal injuries, it is not error to refuse a peremptory instruction to find defendant not guilty where sufficient facts are in dispute as to how the injury occurred.

16. MASTER AND SERVANT, § 706\*—*when question as to master's liability properly submitted to jury.* In an action by an employee to recover for personal injuries sustained while plaintiff was engaged as a freight conductor in setting out cars from his train to a siding, as required by defendant's train order, where the declaration contained a count alleging a violation of the Federal Employers' Liability Act, and the application of such act was clear under the evidence, *held* that the case was properly submitted to the jury, there being disputed questions of fact as to the control of the track where the accident occurred, and as to whether a coupling was defective, uncoupled or broken.

17. WITNESSES, § 224\*—*when witness may be examined as to written statements.* It is not error to refuse to permit cross-examination of a witness as to statements made by him in writing where the record does not show the statement claimed to have been made.

18. EVIDENCE, § 153\*—*when exhibition in evidence of bones permissible.* In an action to recover for injuries to plaintiff's spine caused by being thrown from a car and falling a distance of 37 feet, which injury resulted in temporary paralysis of plaintiff's legs, *held* that the exhibition in evidence of the fourth and fifth lumbar of the spinal column was properly permitted.

19. EVIDENCE, § 151\*—*when explanation of X-ray pictures proper.* In an action to recover for injuries to plaintiff's spine, explanation of X-ray pictures of the injury *held* proper.

### On Rehearing.

1. MASTER AND SERVANT, § 98\*—*when employee deemed to rely on Federal Employers' Liability Act.* In an action by an employee to recover for personal injuries, where counts in the declaration allege a violation of a Federal statute and where it is not clear whether plaintiff relies on the Federal Employers' Liability Act, or the Federal Safety Appliance Act, a separate statute, plaintiff of necessity relies on the former, since such act regulates and controls the liability of the employer to the employee, whether the employer has violated the Safety Appliance Act or has been guilty of general negligence.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. MASTER AND SERVANT, § 98\*—*when remedy provided by Employers' Liability Act exclusive.* The remedy provided by the Federal Employers' Liability Act for injuries to an employee while engaged in an interstate commerce service is exclusive and supersedes all remedies provided by State legislation.

3. MASTER AND SERVANT, § 98\*—*when remedy provided by Employers' Liability Act exclusive.* In an action to recover for personal injuries sustained by plaintiff while working as a freight conductor, the Federal Employers' Liability Act applies exclusively where it appears by uncontradicted testimony that in plaintiff's train at the time of the injury there were cars billed from a point in Illinois to a point in Missouri.

4. APPEAL AND ERROR, § 369\*—*when not necessary that question of exclusion of application of State statute by Federal statute be raised in trial court.* In an action by an employee to recover for personal injuries, where in different counts plaintiff alleged common-law negligence, a violation of a State statute and of the Federal Employers' Liability Act, it is not necessary that the question of the exclusion of the application of the State statute by the Federal statute be raised at the trial in order to enable defendant to raise such question on review, since if it appeared at the trial that at the time of the injury plaintiff was engaged in an interstate commerce service, the Federal act would apply and supersede the State legislation.

5. COURTS, § 150\*—*when immaterial that Appellate Court misconstrued decision of Supreme Court.* It is unimportant on rehearing whether the Appellate Court misconstrued an opinion of the Supreme Court where the Supreme Court in a case later than that on which the Appellate Court based its decision used language confirming the construction given to the former case by the Appellate Court.

6. COMMERCE, § 5\*—*when Federal law exclusive.* Wherever Congress sees fit to legislate concerning interstate commerce, its legislation is exclusive.

7. COMMERCE, § 5\*—*when jurisdiction of Congress exclusive.* In an action by an employee to recover for personal injuries where in different counts plaintiff alleges common-law negligence, a violation of a State statute and of the Federal Employers' Liability Act, it is immaterial that the act alleged to have caused the injury be a violation both of the Federal act and the State act, it appearing that at the time of the injury plaintiff was engaged in an interstate commerce service, since in such case the jurisdiction of Congress is exclusive when once it acts.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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Appeal from the Circuit Court of Marion county; the Hon. JAMES C. McBRIDE, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed May 1, 1915. Rehearing granted and opinion filed December 1, 1915.

R. J. GODDARD and KAGY & VANDERVORT, for appellant.

J. J. BULLINGTON and HOLT & WILSON, for appellee.

MR. JUSTICE HARRIS delivered the opinion of the court.

The original declaration filed in this case consisted of five counts. The first two counts based upon the common-law duty of appellant to furnish appellee with a reasonably safe place to work and to keep the switch and side tracks upon which he had orders from appellant to place cars free from obstructions. The third count was based upon the statute of Missouri and the statutory duty of appellant to equip its cars in accordance with the statute. Demurrer was sustained to these three counts and appellee, by leave of the court, filed three amended counts in lieu thereof.

The first two amended counts are founded on the common-law duty of appellant to furnish appellee a reasonably safe place to work, a switch and side track, upon which he was ordered to place cars, so that the cars might pass over without endangering life or limb of appellee, and charging that appellant disregarded its duty and negligently and carelessly permitted a wire to extend along and over and in close proximity to the side or switch track aforesaid and to swing along in close proximity and against the cars of appellant as they moved along upon said switch or side track, by means whereof, while appellee was in the performance of his duty in pursuance to orders given him by appellant and while in the exercise of due care, was caught by the wire and thrown from said train

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into a ravine some 37 feet below, by reason of which he sustained serious and permanent injury; and that he sustained damages in the amount of \$25,000.

The third amended count of the declaration was based upon a Missouri statute, making it the duty of appellant to equip its locomotive engine with power drive wheel brakes and fully and properly equip air brake appliances so that the engineer operating locomotives could fully and completely control the air brakes on the cars attached to the said locomotive engine without recourse to the hand brakes so that at least seventy-five per cent. of the cars composing such train should be equipped with air or power brakes, and that appellant neglected its duty in this behalf by reason whereof appellee was required to go on the moving cars and while exercising due care was injured in the manner as charged in the first two amended counts.

The fourth and fifth counts of original declaration charged appellant with the duty of equipping its train in accordance with the Federal statute in regard to power wheel brakes and appliances for the operation of train and brake system and to equip the train with automatic coupling, continuous brakes, etc., so that not less than fifty per cent. of the cars of such train would have their brakes used and operated by the engineer engaged in moving the cars so associated together and trains of cars without requiring the use of hand brakes for that purpose, and not to move or operate the said cars or trains of cars, or the standing cars on its railroad track, switch or side track being used by appellant without being equipped as aforesaid. That said train of cars was being used in moving interstate traffic, being hauled and conveyed from points in State of Illinois to points in State of Missouri but that appellant neglected its duty in this behalf by reason whereof appellee, while obeying orders of appellant, and in the exercise of due care, was seriously and

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permanently injured in manner as charged in first two amended counts.

To this declaration appellant filed plea of general issue and the trial proceeded to the offering of evidence by appellant, when by leave of court appellant filed four special pleas. A demurrer was sustained to the third special plea. The other three averred in substance:

First. That track where injury occurred was not the track of appellant, nor under the control of appellant; that the wire that caused the injury was not the wire nor under the control of appellant.

Second. That the track on which injury occurred was the track of the St. Louis Smelting Company.

Third. That appellant did not own, use or operate railroad and bridge over Flat River and for more than 1,000 feet on either side of said River, and did not have permission to use its cars on or over same.

A trial upon the issues so joined resulted in a verdict in favor of appellee for \$10,000. Motion for new trial overruled, judgment on verdict, and this appeal.

Some of the undisputed facts are: That appellee, a man thirty-two years of age at the time of the trial, entered the service of appellant as train conductor in July, 1912. That he was at that time and prior to the accident had been a man in good health and physically able to perform manual labor; that the railroad of appellant extends from Salem, Illinois, to Bismark, Missouri, with a branch line to Chester, Illinois. That appellee did in the handling of trains for appellant have charge of trains containing cars whose destination was from points in Illinois to points in Missouri and vice versa. At the time of the injury appellee left Little Rock yards at 8:30 p. m., September 16, 1912, in charge of a train which had three cars of coal destined from a point in Illinois to Bismark, Missouri. That appellee at Little Rock yards, which is St. Genevieve, Missouri, had seventeen empties, known as

“chat cars” destined to what was known as the “National switch” at Flat River, Missouri. That about 7:30 p. m. of said day appellee received from appellant a message as follows: “Conductor Extra 312 South leave your chat empties on National switch.” That appellee arrived with his train at the National switch, Flat River, Missouri, at about 11:45 p. m., of said day. The chat cars were next to the caboose. The caboose was cut off on the main track and the train was pulled down over the switch leading to the National switch. The rear brakeman Merritt, under instructions of appellee, walked back to see if switches were properly set and if there were any cars there. There were cars standing on the main line of this National switch. There was also behind these chat cars a car with an iron tank chained to the rails. About five car lengths from where the National switch leaves the main track of appellant, there is another switch which will hold twelve or fourteen cars, and on that siding there was about twelve to fourteen loads of chat, but by lining the switches for this siding they could shove around the car that was chained to the rail. The brakeman made a coupling at the end of the cars next to the tracks of appellant on the siding. Appellee walked to rear end of the cut of cars and gave the back up signal for them to couple up. The brakes were set on the loads and the engine could not shove them back. Appellee and rear brakeman commenced releasing brakes on these loads. There was not room to place seventeen cars on the National switch without moving the cars on the siding of the National switch. The engineer to move this train of cars started all cars forward, then in a quarter or a half car length reversed his engine and got them to moving back to the National switch. Appellee moved to rear end of train and the train was then moving towards National Lead Company’s mine rapidly. Appellee commenced to set brakes. At that time the cars were on the track leading to the bridge

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or trestle. Appellee moved to the side of the car, and was looking west when a wire over the left shoulder began to draw down and forced appellee to lose his grip and fall 37 feet over the bridge or trestle into the bed of Flat River. That he suffered an injury causing pain and for a time the lower limbs were paralyzed.

The National switch, as it is designated, is composed of a main line and side track used as interchange tracks between appellant and the St. Louis Smelting and Refining Company, a company having a place of business near Flat River, and a railroad operated by electricity and steam over the bridge and trestle mentioned at Flat River. The ownership and possession of these tracks, their location and distances are not in dispute. The dispute arises over the right or the fact whether or not appellant, its servants and employees were confined in their work to the interchange tracks or whether or not when the interchange tracks were full they could and did use the line being a continuation of the siding between the two tracks across the bridge, appellant contending the employees had no such privilege and appellee insisting they did. About 200 feet from where the switch track leaves the main line of appellant there is a siding branching off from the switch track for a distance of 1080 feet and then connects with it again and the switch track with the line of Smelting Company 753 feet east of the bridge in question. There is about a two per cent. downward grade towards bridge from east and about four per cent. grade towards bridge from the west. That the cars in question were backed by the engine and train from this siding on to the switch track and from the switch track on the track in the use of Smelting Company over the bridge. That there were trolley wires over this line over the bridge and telephone wires along said line connecting the smelting works with the depot of appellant at Flat River. That the telephone wires

were not in use at the time in question and were out of repair.

The assignment of errors argued by appellant are:

First. That it is not denied that appellant was operating an interstate railroad and that appellee was at the time engaged in interstate commerce; that the Federal Employer's Liability Law of 1908 took possession of the field to employees engaged in interstate transportation by rail and all State laws are superseded.

Second. That it was error to admit in evidence the statute of the State of Missouri and to incorporate it in an instruction directing a verdict.

Third. There is no liability on the part of appellant in this case for the reason that the engine and the cut of cars making this switching movement came to a full stop and were uncoupled by the brakeman, permitting them to roll down the steep incline. There was no speed to control. The engine and cars attached to it were standing still.

Fourth. Errors in admitting and refusing to admit evidence.

Fifth. Errors in giving and refusing instructions.

The first, second and fifth assignments of error argued by appellant were so closely associated together during the trial of this case and in the application of the law under the other assignments so that we may consider them as one. We will discuss and consider them first, as to the relation of the application of the Federal Employer's Liability Law and the Missouri Safety Appliance Act both pleaded in the same declaration. The jury instructed upon both statutes while under the evidence the employment in which appellee was engaged was interstate and not in dispute.

The provisions of the Federal Employers' Liability Act are limited to injuries occurring while the particular service in which the employee was engaged was a part of interstate commerce. (*Illinois Cent. R.*

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*Co. v. Behrens*, 233 U. S. 473, 10 N. C. C. A. 153.) That the employee of a railroad company in the handling of a train in which it is admitted are three cars, among those being then moved, which were then engaged in interstate commerce, is a prima facie case made by uncontradicted testimony of the fact that appellee was then engaged in interstate commerce. (*Devine v. Chicago, R. I. & P. Ry. Co.*, 266 Ill. 248.)

Appellant with its records or any competent evidence could have met this prima facie case and raised the question of fact whether or not appellee was at the time engaged in interstate or intrastate commerce. Therefore while appellee might properly file a declaration to meet the evidence, whatever it might be, the appellant was not bound to make objections to the declaration for that reason. It is not a matter of election, if it becomes a question of fact, it is to be submitted as any other question of fact. If, however, as in this case, it is not a matter of dispute but admitted it is a question of law, and the injury occurring in interstate commerce, the Federal act controls and a recovery cannot be had under the common or statute law of this State; the Federal act is exclusive and not merely cumulative. (*Wabash R. Co. v. Hayes*, 234 U. S. 86, 6 N. C. C. A. 224; *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 8 N. C. C. A. 834; *Devine v. Chicago, R. I. & P. Ry. Co.*, 266 Ill. 248.)

The contention of appellee that both the Federal and Missouri acts are in force at one and the same time and a suit and a recovery may be had under either act on the same state of facts is based upon the case of *Luken v. Lake Shore & M. S. R. Co.*, 248 Ill. 385. There is no conflict between this case and the authorities heretofore cited. In the last case the question being considered by the court was whether or not the statute of the State being in harmony with the Federal act could be considered when the injury complained of occurred while the party injured was engaged in intrastate com-



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merce on a railroad that was engaged, generally, in interstate commerce. It is necessary to consider the contention of appellee that appellant did not in the trial court raise the questions here urged as grounds for reversal.

We have heretofore referred to the fact that it was not necessary or proper for appellant to raise objections to the declaration on the ground alone that there was joinder of counts under the Federal act, Missouri act and common-law duty. Appellee made the proof of this train handling, at the time, interstate business. Appellee offered the Missouri statute in evidence. Appellant objected to the offer in the following language: "Objected to by defendant for the reason that those sections can have no application to this case; for the reason that this train was stopped and the engine was at the time completely cut off from the rest of the train when these cars started to rolling; there is no doubt about the facts in this case now." Appellee insists that this objection is limited to the ground that the train was stopped and engine cut off. As we read the objection it is based first on the ground the statute has no application, and second on the ground the train was stopped and engine cut off. There was no doubt about the application of the Federal law from the evidence. The Missouri statute had no application, was incompetent, and the objection should have been sustained.

The argument of appellee that a verdict will not be set aside if supported by one good count does not apply, especially when the court gave an instruction for appellee based upon the Missouri statute and directing a verdict which under the admitted facts was error. Exceptions were duly preserved to the giving of this instruction and assigned as error in the motion for new trial. (*Patry v. Chicago & W. I. R. Co.*, 265 Ill. 310.)

Appellee asked and the court gave instruction for appellee Number 3 (which is too long to be copied into

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this opinion), based upon the third amended count and in which the Missouri statute is set out at length, and the jury are told that if they believe from the evidence appellant had violated that statute and appellant's negligence in that regard had caused the injury they may find appellant guilty under third amended count.

The appellant offered, with other instructions, a separate instruction under each count to find the defendant not guilty, which were refused. The offer of these instructions at this time, while they should have been given as to the three amended counts, there being left two good counts to support a verdict, would not be reversible error. However, the giving of appellee's third instruction based upon a count under the admitted facts that would not support a verdict, the jury might believe appellant had not violated the Federal law but had violated the Missouri law, and if so they were told to find appellant guilty. We are of opinion that the giving of this instruction was error.

The errors in admitting in evidence the Missouri statute and the giving of appellee's instruction No. 3, based upon the Missouri statute, were reversible errors.

The third error argued by appellant is in effect that the court committed error in not giving the peremptory instruction. There were sufficient facts in dispute as to how this injury occurred, who had control of the line where the injury occurred, and whether the coupling was defective, uncoupled or broken, to be submitted to the jury.

The fourth contention, errors in admitting evidence but two are argued. That the court refused to permit cross-examination of witness Merritt as to statements made by witness in writing. The record does not disclose what the statement was that appellant claimed was made, and without such showing the court's ruling on the same was not error. The evidence offered by appellee, the exhibition of the fourth

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and fifth lumbar of the spinal column and the explanation of the X-ray pictures, were properly permitted and admitted.

The importance of this case and the principles involved require an accurate application of the law.

Therefore for and on account of the errors sustained, the judgment will be reversed and cause remanded.

*Reversed and remanded.*

MR. JUSTICE McBRIDE took no part in the consideration and decision of this case.

OPINION ON REHEARING BY MR. JUSTICE BOGGS.

The petition for rehearing was granted in the above entitled cause and said cause was reargued by counsel for both parties, and said cause was reconsidered by the court.

It was urged by appellee in his petition for rehearing, first, that the court had misunderstood the pleadings in the case and had overlooked the fact that the Federal Employers' Liability Act was not pleaded, and that this act was not relied on. Also, that appellee in the fourth and fifth counts of his original declaration based his cause of action upon the Federal Safety Appliance Act, and that this is a separate act from the Federal Employers' Liability Act. We think, however, that appellee in the fourth and fifth counts of his declaration must, of necessity, rely on the Federal Employers' Liability Act, for these two counts charge in effect that appellant was engaged in interstate commerce.

This act regulates and controls the liability of the employer to the employee, whether the employer has violated the Federal Safety Appliance Act or whether the charge is one of general negligence. Its jurisdiction is exclusive and supersedes all State legislation.

Second. It is contended that the Missouri Safety

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Appliance Act was properly admitted in evidence. The evidence in this case is that appellee was engaged, at the time of his injury, in interstate commerce. Appellee testified that in the train in question were billed three cars of coal from a point where the Iron Mountain crosses the Illinois Southern in the State of Illinois, destined to Bismark in the State of Missouri, and that these three cars were in that part of the train engaged in making the move at the time the appellee claims he was injured. There was no evidence to dispute his testimony on this question. That being true, the Federal Employers' Liability Act would apply, and would be exclusive. (*Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 3 N. C. C. A. 779; *Southern R. Co. v. Railroad Commission of Indiana*, 236 U. S. 439.)

Third. Appellee also contends that the question of the application of either of the Federal acts to the exclusion of the State act was at no time considered during the trial. We do not understand this to have been necessary. If it developed on the hearing that appellant was engaged in interstate commerce, then the Federal Employers' Liability Act would apply and would supersede any State legislation in connection therewith. The record, however, shows that objection was made to the introduction of the Missouri statute on the trial which raised the question, were it necessary to be raised.

Fourth. It is also contended by appellee that the court misapprehended the case of *Luken v. Lake Shore & M. S. R. Co.*, 248 Ill. 385. We do not believe that the opinion heretofore rendered by the court in connection with the case at bar is subject to this criticism. However that may be, our Supreme Court in the recent case of *Staley v. Illinois Cent. R. Co.*, 268 Ill. 356, in reviewing its former opinions, and also the opinions rendered by the United States Supreme Court, touching the jurisdiction of Congress to legislate on the relations of employer and employee where engaged in

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interstate commerce, holds conclusively that once Congress has undertaken to legislate in connection with this matter, that its jurisdiction becomes exclusive. So whatever may be said with reference to the holding of the court in the *Luken* case, *supra*, there can be no question in regard to its position in the case of *Staley v. Illinois Cent. R. Co.*, *supra*. This latter case sets at rest the position of our Supreme Court in regard to the exclusive jurisdiction of Congress in reference to matters connected with interstate commerce. Whenever Congress sees fit to legislate in regard thereto, its legislation is exclusive.

Appellee's fifth contention is that the failure of appellant to equip its cars was a violation of both acts; that is, a violation of the Federal law and of the Missouri law. What we have said heretofore in regard to the exclusive jurisdiction of Congress when once it has acted covers this objection, and instruction No. 3, given on behalf of appellee, authorizing the jury to find for the plaintiff, basing appellant's liability on the Missouri statute, was erroneous, the evidence of appellee showing conclusively that he at that time was engaged in interstate commerce.

We adhere to our former opinion and order the same filed together with this additional opinion as the opinion in the case. Said cause is reversed and remanded for further proceedings, not inconsistent with the views herein expressed.

*Reversed and remanded.*

MR. JUSTICE McBRIDE took no part in the hearing of said cause.

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Handley v. The People, 196 Ill. App. 556.

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**Clarence Handley, Appellant, v. The People of the  
State of Illinois, Appellee.**

**(Not to be reported in full.)**

Appeal from the County Court of Fayette county; the Hon. JOHN H. WEBB, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed July 21, 1915.

**Statement of the Case.**

Information in bastardy, initiated by the People of the State of Illinois on complaint of Ella Fay Casey, against Clarence Handley, defendant, charging defendant with being the father of a bastard child to whom prosecutrix gave birth. From a judgment for plaintiff for five hundred and fifty dollars, defendant appeals.

Prosecutrix was an unmarried woman, and the child was born on October 17, 1913. Prosecutrix filed a complaint against defendant in said County Court on December 8, 1913, charging him with being the father of her child. The prosecutrix testified that defendant had sexual intercourse with her about the third Sunday in December, on the 12th of January and on the 20th of February. The defendant denied that he had sexual intercourse with her at any time during the months of December, January or February and offered evidence tending to show an alibi as to the date fixed in January.

It appeared that the prosecutrix and defendant lived about one mile apart and had known each other ever since childhood, and had been keeping company for some time prior to the birth of the child.

The testimony was conflicting. Prosecutrix testified that defendant had sexual intercourse with her at the dates above mentioned, and that later he met her at the train on her return from a trip north; and that he went to church with her on the night of January 12th,

and that on such date she sustained improper relations with him, and she was corroborated by her mother and to some extent by another witness as to having been in company with him on the night of January 12th.

It further appeared that after prosecutrix's mother ascertained that she was pregnant, the two went to the home of Handley and had a talk with him about the paternity of the child; that when the mother said that they wanted to settle this trouble he did not then deny the paternity but said he wanted to talk with the daughter privately and they did so; and he then said he did not know what to do, and the daughter said his only objection was that he had heard that another man had had sexual intercourse with her and that defendant then admitted they were both to blame.

It further appeared that defendant frequently visited the prosecutrix at her home during the two years prior to the birth of the child. The defendant denied that he ever had sexual intercourse with her except on the 2nd of April, when he met her on her return home from the north. He claimed that on the night of January 12th he was in company with a young lady at a certain place but did not attempt to show where he was upon either of the other dates on which she alleged they sustained improper relations. As to the date of January 12th, he introduced several witnesses whose testimony tended to show that on the night of January 12th she was in the company of another man, and the testimony of other witnesses who also claimed to have been at the church on that evening and did not see defendant and prosecutrix.

F. M. GUNN, for appellant.

J. G. BURNSIDE, for appellee.

MR. PRESIDING JUSTICE McBRIDE delivered the opinion of the court.



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### Abstract of the Decision.

1. **BASTARDS, § 33\***—*when question of paternity for jury.* In an information in bastardy, where the evidence is conflicting, the question whether defendant is the father of the child is a question for the determination of the jury.

2. **BASTARDS, § 22\***—*when specific date not controlling as to time of conception.* In an information in bastardy, where the child alleged to have been begotten by defendant was born on October 17, 1913, and where prosecutrix testified that defendant had intercourse with her on a date in December, 1912, and on January 12, 1913, and February 20, 1913, the date of January 12, 1913, is not absolutely controlling as to the date when the child was begotten, since a pregnancy due to intercourse had between defendant and prosecutrix in December, 1912, may have been abnormally protracted.

3. **WORDS AND PHRASES—duration of pregnancy.** The duration of the pregnancy of a human female may be stated to be from 260 to 308 days after coition, and the usual or average period to be 276 days, but such duration may exceed its nominal limit, and the limit of such excess cannot be accurately known in the present state of physiological science.

4. **BASTARDS, § 23\***—*credibility of witnesses.* In an information in bastardy, where the testimony of defendant and of prosecutrix is conflicting, it is frequently difficult to determine which witness tells the truth, since the desire of the mother to secure a parent for her child and the desire of defendant to avoid the consequences of his conduct are incentives for concealing the facts.

5. **BASTARDS, § 22\***—*when date of alibi not conclusive as to date when child begotten.* In an information in bastardy where prosecutrix testifies that defendant had intercourse with her on several named dates, which defendant denies, and offers evidence tending to prove an alibi on one of the dates named, but fails to show where he was on the other dates, if not with prosecutrix, the date as to which defendant proves an alibi will not be deemed controlling as to the date when the child was begotten if it is possible that defendant might have begotten the child on either of the other dates named by prosecutrix as those on which defendant had intercourse with her.

6. **BASTARDS, § 22\***—*when evidence sufficient to sustain finding as to paternity of child.* In an information in bastardy, where prosecutrix testifies that defendant had intercourse with her at a date when defendant might have begotten the child, a verdict finding that defendant was the father of the child *held* sustained by the evidence.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Handley v. The People, 196 Ill. App. 556.

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7. **BASTARDS, § 34\***—*when instruction as to immateriality of dates when intercourse took place proper.* In an information in bastardy, an instruction, in substance, that if defendant was by a preponderance of the evidence found to be the father of the child, the dates when intercourse took place between defendant and prosecutrix were immaterial, even though prosecutrix was mistaken as to the particular date testified to as that on which such intercourse took place, *held* not erroneous under the evidence, it appearing that prosecutrix testified to three dates on which defendant had intercourse with her.

8. **BASTARDS, § 34\***—*when instruction to find for defendant not erroneous.* In an information in bastardy, where defendant requested an instruction that if plaintiff had not sustained the charge that defendant was the father of the child, "or if on this point the preponderance of the evidence is that he is not such father or if you find the evidence equally balanced" then the jury must find for defendant, an objection to the instruction as modified by striking out the quoted words, *held* not well taken, it appearing that the instruction as given told the jury that they could find defendant to be such father only where such finding was supported by a preponderance of the evidence.

9. **BASTARDS, § 34\***—*when instruction properly modified by striking out reference to date when intercourse took place.* In an information in bastardy, an objection to the modification by the trial court of a requested instruction by striking out the words "on the 12th day of January or at any other time," *held* not well taken, such words being misleading, where the instruction as given told the jury that if defendant did not have sexual intercourse with prosecutrix during the period wherein she became pregnant defendant could not be found to be such father of the child, it being immaterial at what date the child was begotten if defendant be found to be the father, and it being therefore improper to call attention to the date when any intercourse took place unless a date when it was impossible that defendant could have begotten the child.

10. **APPEAL AND ERROR, § 1561\***—*when refusal of proper instructions not reversible error.* In an information in bastardy, instructions examined and *held* not reversible error, although objections thereto were well taken, it appearing that the jury had been fully instructed that all the facts and circumstances in evidence should be taken into consideration in arriving at a verdict.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Bandy v. Litchfield & Madison R. Co., 196 Ill. App. 560.

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**George C. Bandy, Appellee, v. Litchfield & Madison  
Railroad Company, Appellant.**

**(Not to be reported in full.)**

Appeal from the Circuit Court of Madison county; the Hon. LOUIS BERNREUTER, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed July 21, 1915.

**Statement of the Case.**

Action by George C. Bandy, plaintiff, against the Litchfield & Madison Railroad Company, in the Circuit Court of Madison county, to recover for personal injuries sustained by plaintiff by reason of the negligent operation of a motor car on which he was riding. From a judgment for plaintiff for \$1,000, defendant appeals.

The case of *Schmidt v. Litchfield & M. R. Co.*, 179 Ill. App. 533, was a suit by witness Alois Schmidt, who was one of plaintiff's bridge gang, to recover for injuries received in the same accident, and a verdict for plaintiff in that action was reversed by this court as manifestly against the weight of the evidence. This case has previously been before this court on appeal from a judgment for plaintiff, which was reversed for the same reason as in the *Schmidt* case, *supra*, see 183 Ill. App. 492.

The declaration consisting of three counts which were substantially the same, charged that on May 23, 1910, the plaintiff, at the special request of defendant, and while in its employ, was taken upon a motor car operated by the defendant to be hauled upon defendant's railroad from his place of work at a bridge near Madison to Edwardsville, and the defendant, by its servant Clarence Bickle, negligently operated said motor car; that while it was passing along said railroad near a bridge or trestle, the motor car ran against a dog upon the track of said railroad and was derailed,

whereby the plaintiff was thrown upon said railroad track and injured.

It appeared that on May 23, 1910, the plaintiff was at work for the defendant upon a bridge near Madison, acting as foreman of the bridge gang, and arranged with Clarence Bickle, who operated a motor car for the defendant, and resided at Edwardsville, to come with the motor car at the close of the day's work and haul the plaintiff and his bridge gang to Edwardsville; that Bickle at the appointed time came to the bridge and took plaintiff and his associates upon the motor car and started for Edwardsville, running at a rate of speed variously estimated at from eighteen to twenty-five miles per hour; between Edwardsville and Madison and about five miles north of Madison its railroad crosses a bridge or trestle over Cahokia Creek, and as the motor car came to the trestle it struck a dog, and the car was derailed and plaintiff was injured.

It also appeared that the dog that was killed by this motor car belonged to a man by the name of Bowen, and was first seen at the side of the track and some distance from this trestle. All of the witnesses seemed to agree that the dog was killed upon the trestle, and at about five or six feet from the end of the trestle.

Alois Schmidt, who was also injured, testified that he noticed the dog jump upon the track about one hundred feet away from the trestle, and that he drew Bickle's attention to that fact, and told him: "Better stop the car because we are in danger." Bickle said: "Watch me knock that dog, etc.," and that the car was then running about thirty-five miles an hour; that he felt Bickle raise the speed of the car. William Schmidt testified that he saw the dog running along the track and said: "Look out there Mr. Bickle you are going to hit that dog" and he turned around and said: "'Watch me hit this dog, etc.," and just then the dog ran along the track, I guess about seventy feet, two rail lengths; the dog ran along the side of the track

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and I cautioned him again and turned back to Mr. Bandy, and just then I turned to look around and I seen the dog run on the ties of the bridge, etc.”; and on cross-examination this same witness said: “We were two hundred yards or more from the trestle when he (the dog) left the men. He went a pretty good speed towards the track up the hill. He came in a gallop, all the way along the track. He was about seventy feet or more from the trestle when he came to the track; then our car was about thirty feet from him. The dog was not more than ten feet away from the track when I called Mr. Bickle’s attention to it. When he got up to the tracks, he just galloped right along side of the track up to the trestle, when he made one hop on the trestle and started in a kind of trot and fell between the ties and throwed his head over the rails. When the dog jumped on the trestle our car was about eight feet from him.”

Another witness, Barney Russel, called by plaintiff, testified that just before the accident the dog was on the side of the track, the car being on the south side of Bowen and the boys. Witness did not see the dog again until he got to the trestle. Plaintiff had no recollection of seeing the dog. Alois Schmidt was the only witness who saw the dog on the track in front of the car before reaching the trestle. Schmidt made a statement to Dr. Ferguson, who testified: “On the evening of the accident Mr. Alois Schmidt said to me at that time and place that some men there on the side of the track were holding the dog, and that the dog got away from them and jumped under the car, and nobody could avoid striking it,—or a statement to that effect. He also said at that time that the dog sprang out from where these men were and jumped under the car and nobody could avoid striking it. He also said at the same time and place that this was purely an accident and that Mr. Bickle was not to blame in any way.” The doctor further states that on the next

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morning after the accident Alois Schmidt told him substantially the same thing.

Witness Taylor, for defendant, testified that he first saw the dog five or six feet from the trestle, and heard no statement by Schmidt to Bickle about striking the dog. Bowen, the owner of the dog testified that a second or two before the accident the dog was with him at a distance from the track fixed at about sixty feet by the witnesses, and the next he knew the car was running over the dog. Bowen was substantially corroborated by two witnesses. Bickle testified as follows:

“When within five or six feet of the trestle I saw the dog running along the right-hand side of the track; he was bounding up on top of the trestle just in front of the side of the car. I had not seen the dog before that. When I first saw him I think he was running as fast as he could run in a northerly direction; about the first bound he made on the bridge his forefeet went up and his rear parts fell over the rail and the car struck him.” Witness also said that he built this car out of an old automobile, and that its maximum speed was twenty-two to twenty-three miles per hour, and denied that the Schmidts said to him to look out that he was going to hit the dog, or anything to that effect.

WARNOCK, WILLIAMSON & BURBOUGHS, for appellant.

C. H. BURTON, for appellee.

MR. PRESIDING JUSTICE MCBRIDE delivered the opinion of the court.

### Abstract of the Decision.

1. MASTER AND SERVANT, § 697\*—*when evidence insufficient to sustain verdict.* In an action to recover for personal injuries sustained by plaintiff while riding on a railroad motor car as a result of the

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Heirsch & Micotto v. Lorimer & Gallagher Co. et al., 196 Ill. App. 564.

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car being derailed by striking a dog, where the evidence tended to show that the dog jumped suddenly on the track in front of the car and was struck before there was time to check the speed of the car, a verdict for plaintiff *held* manifestly against the weight of the evidence.

2. APPEAL AND ERROR, § 1802\*—*when judgment reversed second time because against weight of evidence, not remanded.* In an action to recover for personal injuries, where a previous judgment for plaintiff has been reversed by the Appellate Court as manifestly against the weight of the evidence, and where in another action growing out of the same accident a judgment for plaintiff has been reversed for the same reason, a judgment for plaintiff in a second trial, when reversed for a similar reason, will not be remanded.

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**Heirsch & Micotto, Appellees, v. Lorimer & Gallagher Company and O. T. Dunlap Company, Appellants.**

(Not to be reported in full.)

Appeal from the City Court of East St. Louis; the Hon. W. M. VANDEVENTER, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed July 21, 1915.

**Statement of the Case.**

Action of assumpsit by Heirsch & Micotto, plaintiffs, against the Lorimer & Gallagher Company and the O. T. Dunlap Company, defendants, in the City Court of East St. Louis, to recover on a contract. From a judgment for plaintiffs for \$1,558.61, defendants appeal.

The declaration was in one count, declaring specially on the following contract: "It is stipulated and agreed by and between the parties hereto that a mutual settlement of their accounts has been this day arrived at, and that there is due the plaintiffs on an account stated from the defendants by way of compromise and settle-

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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Heirsch & Micotto v. Lorimer & Gallagher Co. et al., 196 Ill. App. 564.

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ment, the sum of two thousand two hundred and forty-four dollars and sixty-one cents (\$2,244.61), subject to the final acceptance of the work done by the plaintiffs under their contract with the O. T. Dunlap Company in building the sewer on St. Clair Avenue, East St. Louis, Ill., and in consideration of the mutual settlement made as hereinbefore stated the defendants agree to pay to the plaintiffs within the next few days the sum of six hundred and eighty-six dollars (\$686.00) cash and to pay the balance of fifteen hundred and fifty-eight dollars and sixty-one cents (\$1,558.61) immediately upon acceptance of such work done by the plaintiffs by the City of East St. Louis, and to exercise due diligence in an effort to have the final confirmation and approval of the work on the outlet sewer, including the portion done by the plaintiffs, confirmed and accepted by the City of East St. Louis, Ill.”

Defendants pleaded the general issue, and it was agreed that evidence admissible under any proper special plea might be introduced under the general issue. The case was tried by the court without a jury. The main question at issue was the construction of the contract.

The court gave the following instructions for defendant:

2. “That it is competent to show on the trial of this case that the city authorities refused to accept the work done by the plaintiffs until after the defendants had expended a certain sum of money in doing the work required of the plaintiffs under their contract with the defendants and required by the contract and the ordinance therein referred to, under which the defendants were doing the work for the City of East St. Louis, and that whatever sum was necessarily expended by the defendants in doing any work originally required of the plaintiffs under their contract with the defendants before the City of East St. Louis could accept the same, may be set off as credit in favor of the defendants against the amount of the plaintiffs’ demand.”

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3. "The Court holds as a matter of law that if after the making of the agreement sued on in this case, the defendants were compelled to incur expense or expend money in finishing, completing, repairing and cleaning up, or in the doing of any other work originally required of the plaintiffs under their contract with the defendants before the City of East St. Louis would accept the work in its entirety done by the plaintiffs, then the defendants would be entitled to set off against the plaintiffs' demand in this case whatever sum the evidence shows was necessarily expended by the defendants in completing, finishing, repairing or cleaning up such work in order to have the same accepted by the City of East St. Louis."

4. "The Court holds as a matter of law that it is competent for the defendants in this case to offer oral testimony to show that the work done by the plaintiffs under their contract with the O. T. Dunlap Company was never accepted by the City of East St. Louis in the condition in which it was on the 25th day of January, 1912, the date of the agreement herein sued on, and the defendants may recoup in this action whatever sum it necessarily expended in the completion, repair or finishing of the work which the plaintiffs undertook to do under their contract with the O. T. Dunlap Company, if the proof further shows that the defendants requested them to complete, repair or finish said work after the making of the agreement on the 25th day of January, 1912, and the plaintiffs failed to do so."

DAN MCGLYNN, for appellants.

D. E. KEEFE, for appellees.

MR. PRESIDING JUSTICE MCBRIDE delivered the opinion of the court.

### Abstract of the Decision.

1. **CONTRACTS, § 177\***—*what is primary object in construction of.* In construing a contract, the primary object is to discover and give effect to the intention of the parties, so that performance may

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Heirsch & Micotto v. Lorimer & Gallagher Co. et al., 196 Ill. App. 564.

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be enforced according to the sense in which parties mutually understood the contract when made.

2. **CONTRACTS, § 177\***—*what effect given to clear intent of parties in construction of.* In construing a contract, greater regard should be had to the clear intent of the parties than to any particular words used to express such intention.

3. **CONTRACTS, § 183\***—*when evidence of circumstances leading to execution of contract admissible to aid in construction of.* Where a contract does not state on its face sufficient facts to enable the court to determine its true intent, and the terms of such contract are uncertain, evidence is competent of the circumstances leading to the execution of such contract, not as changing or modifying it, but to enable the court to place itself as nearly as possible in the position of the parties when such contract was made so as to understand the language used in the sense intended by the parties, and thereby arrive at its true intent, and to enforce the contract accordingly.

4. **CONTRACTS, § 183\***—*when contract sufficiently uncertain to authorize admission of evidence of circumstances surrounding making of contract.* In an action of assumpsit on a written contract by which defendants promised to pay a sum of money to plaintiffs, "subject to the final acceptance of the work done by the plaintiffs under their contract with O. T. Dunlap Company in building the sewer on St. Clair Avenue, etc.," contract *held* sufficiently uncertain in its terms to render competent evidence of the facts and circumstances surrounding the making of the contract, in aid of its construction.

5. **CONTRACTS, § 294\***—*when securing approval of work by city condition precedent to action by subcontractor against contractor.* Where contractors agreed to pay subcontractors for work done on a city sewer contract, "subject to final acceptance of the work," and the contractors' agreement with the city required that the work be done to the satisfaction of the Board of Local Improvements, and the contractors, upon failure of the subcontractors to secure approval of the work from the board, made the proper corrections and secured approval of the work, *held* that approval by the city of the work done by the subcontractor was a condition precedent to a recovery in an action of assumpsit on the agreement.

6. **CONTRACTS, § 171\***—*when whole instrument considered in construing.* In construing contracts the whole instrument must be considered, and such construction given as to give force and meaning to every part of it, if possible.

7. **SET-OFF AND RECOUPMENT, § 18\***—*when contractor may recoup expense of correcting defects in action by contractor.* In an action to recover on a contract whereby defendants agreed to pay plain-

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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tiffs a sum of money on the acceptance by a city of certain work done by plaintiffs in pursuance of a subcontract with defendants, who had a contract with such city for the work, and where it appeared that such city refused to accept the work as done by plaintiffs and only accepted it when defects in plaintiffs' work had been corrected by defendants, the refusal of the trial court to permit defendants to set-off or recoup against plaintiffs' claim the expense of correcting such defects, *held* erroneous, such payments being in such case money laid out and expended for plaintiffs' benefit.

8. CONTRACTS, § 393\*—*when instruction as to admissibility of evidence to show nonacceptance of work and right of set-off proper.* In an action by subcontractors against contractors on a compromise agreement for the payment of a sum in settlement for work performed on a city sewer contract conditioned upon acceptance of the work performed by the city, an instruction that it was competent to show that the city refused to accept the work done by plaintiffs until defendants had expended a certain sum in doing the work as required by the agreement, and that defendants might set off such sums necessarily expended, *held* proper.

9. CONTRACTS, § 393\*—*when instruction as to right of set-off proper.* In an action by subcontractors against contractors on a compromise agreement for the payment of a certain sum in settlement of work performed on a city sewer contract conditioned upon acceptance of the work performed by the city, an instruction that if the contractor was compelled to incur expense in completing the work originally required of the plaintiffs before the work would be accepted by the city then the defendants were entitled to set off such expenses as had been necessarily incurred, *held* proper.

10. CONTRACTS, § 393\*—*when instruction as to admissibility of parol evidence to show nonacceptance of work, and as to right of set-off proper.* In an action by subcontractors against contractors on an agreement to pay a certain sum in settlement for work performed on a city sewer contract and conditioned upon the acceptance of the work performed by the city officials, an instruction that it was competent for defendants to offer oral testimony to show that the work done by plaintiffs had never been accepted by the city in the condition it was in on the date that the agreement sued on was made, and that defendants might recoup necessary expense in completion of the work upon proof that plaintiffs, upon request to complete the work after date of the agreement, failed to do so.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Conant v. Watts, 196 Ill. App. 569.

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**Eli Conant, Plaintiff in Error, v. Lloyd Watts, Defendant in Error.****(Not to be reported in full.)**

Error to the County Court of Marion county the Hon. C. E. JENNINGS, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded with directions. Opinion filed September 1, 1915.

**Statement of the Case.**

Action by Lloyd Watts, plaintiff, against Eli Conant, defendant, in the County Court of Marion county, to recover eight dollars claimed by plaintiff to be due him from defendant. A trial before a justice of the peace resulted in a verdict by the jury for defendant. The justice's docket did not show that he entered judgment on this verdict. On appeal to the County Court after denying a motion to dismiss the appeal, the court rendered judgment for plaintiff. To reverse a judgment for plaintiff for eight dollars, defendant prosecutes this writ of error.

EARL C. HUGGINS, for plaintiff in error.

No appearance for defendant in error.

MR. PRESIDING JUSTICE MCBRIDE delivered the opinion of the court.

**Abstract of the Decision.**

1. JUSTICES OF THE PEACE, § 162\*—*when appeal cannot be prosecuted.* No appeal can be prosecuted from the verdict of a jury before a justice of the peace until the justice has rendered judgment on such verdict as required by Hurd's Rev. St., ch. 79, sec. 39 (J. & A. ¶ 6900).

2. JUSTICES OF THE PEACE, § 162\*—*when no jurisdiction on appeal because no judgment entered.* A court to which an appeal is prosecuted from the verdict of a jury before a justice of the peace acquires no jurisdiction of the cause appealed where it does not

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Conant v. Watts, 196 Ill. App. 569.

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appear that the justice rendered a judgment on such verdict as required by Hurd's Rev. St., ch. 79, sec. 39 (J. & A. ¶ 6900).

3. JUSTICES OF THE PEACE, § 170\*—*when right to appeal exists.* The authority for appeals from justices of the peace is purely statutory, and such appeals can be taken only in the manner provided by the statute.

4. JUSTICES OF THE PEACE, § 171\*—*when statute confers no right of appeal from mere verdict.* Hurd's Rev. St., ch. 79, sec. 115 (J. & A. ¶ 6976), provides only for appeals from the judgments of justices of the peace, and not for appeals from the verdicts of juries in actions tried before such justices.

5. JUSTICES OF THE PEACE, § 106\*—*what are requisites of judgment.* Under Hurd's Rev. St., ch. 79, sec. 39 (J. & A. ¶ 6900), providing for the rendering of judgments by justices of the peace, no formal words are required in entering such a judgment, but a judgment of some kind must be entered.

6. JUSTICES OF THE PEACE, § 212\*—*when appeal should be dismissed.* On appeal from a justice of the peace where it did not appear that the justice entered a judgment on the verdict of a jury in the action where an appeal was sought to be prosecuted, the denial of a motion to dismiss the appeal *held* erroneous.

7. JUSTICES OF THE PEACE, § 162\*—*when court on appeal no jurisdiction to enter judgment.* In an action tried in the County Court on appeal from a justice of the peace where it did not appear that the justice entered a judgment in the action in which the appeal was allowed, a judgment for plaintiff *held* erroneous, the court having in such case no jurisdiction to enter such judgment.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Owens v. Commonwealth Trust Co. et al., 196 Ill. App. 571.

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**Sallie G. Owens, Appellant, v. Commonwealth Trust Company and William G. Hume, Appellees.**

**(Not to be reported in full.)**

Appeal from the Circuit Court of Marion county; the Hon. ALBERT M. ROSE, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed September 1, 1915. *Certiorari* denied by Supreme Court (making opinion final).

**Statement of the Case.**

Bill by Sallie G. Owens, complainant, against the Commonwealth Trust Company and William G. Hume, defendants, in the Circuit Court of Marion county, to redeem lands from a foreclosure sale. The cause was before this court on a prior appeal in *Owens v. Commonwealth Trust Co.*, 183 Ill. App. 605, wherein is to be found a full statement of the case. The lands sought to be redeemed were sold by a master in chancery on July 1, 1911, under foreclosure of a mortgage. June 29, 1912, defendant Commonwealth Trust Company refused complainant's tender of the amount due, and a decree dismissing the bill was reversed on the ground that the tender made preserved the right to redeem.

Upon the remanding of the cause one W. H. Owens was permitted to appear and answer herein, claiming that the Commonwealth Trust Company held this certificate as security and that it was owned by him subject to the interests of the company, and by which answer it was sought to fix the interests of himself and the company in this fund when redemption should be made. Complainant by motion sought to set aside the order permitting Hume to become a party defendant, and to answer, which was denied, and the cause was heard upon the bill, answers and the evidence, and a decree rendered granting complainants four months in which to redeem, upon payment to the master, or per-



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Owens v. Commonwealth Trust Co. et al., 196 Ill. App. 571.

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sons interested, of the amount for which the property was sold at the foreclosure sale, together with legal interest from June 29, 1912, the time tender was made, and with the amount paid out for taxes, with legal interest. The decree was rendered on February 25, 1914, and it is from this decree that she prosecutes this appeal. From the decree, complainant appeals.

SALLIE G. OWENS, *pro se*.

CHARLES CAMPBELL and KAGY & VANDERVORT, for appellees.

MR. PRESIDING JUSTICE McBRIDE delivered the opinion of the court.

#### Abstract of the Decision.

1. MORTGAGES, § 725\*—*when right to redeem begins*. In a bill to redeem land from a sale under foreclosure of a mortgage, where the decree grants the right to redeem on certain conditions within four months of a specified date, it is immaterial whether the decree was actually entered on such date, as shown by the record, or at a later date as claimed by complainant, since the right to redeem is fixed as from such specified date.

2. MORTGAGES, § 725\*—*when time for redemption allowed by decree not shortened*. In a bill to redeem land from a sale under foreclosure of a mortgage, where a former decree dismissing the bill was reversed on appeal on the ground that complainant had preserved her rights to redeem by making a valid tender of the amount due within the time for redemption, which tender was refused by defendant, such tender being made June 29, 1912, a decree entered, after hearing on remand, granting complainant leave to redeem on certain conditions within four months from February 25, 1914, *held* that the fact that the right to redeem was fixed from such date and not from the date of entering the decree, two months later, did not operate to shorten the time for redemption allowed by the decree, the extension of time for redemption being liberal.

3. TENDER, § 14\*—*when presumed maker of tender able to pay amount at time of hearing*. Since a tender must be kept good to reap the benefits thereof, a decree granting relief on the basis of

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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rights preserved by such tender involves the presumption that the maker of the tender was able to pay the amount of such tender at the time of the hearing, as a result of which the decree was entered.

4. MORTGAGES, § 709\*—*when decree does not require payment of excessive amount to redeem property.* In a bill to redeem land from a sale under foreclosure of a mortgage, where a previous decree dismissing the bill had been reversed on the ground that a valid tender had been made preserving the right of redemption, a decree, after hearing on remand, granting complainant the right to redeem within a named time on payment of the amount for which the property was sold, without interest from the date of tender to the date of hearing, together with the taxes paid by defendant on the property sought to be redeemed between the time of sale and the date of the hearing, *held* not to require complainant to pay an excessive amount as a condition of the redemption allowed.

5. MORTGAGES, § 710\*—*when party buying at foreclosure sale entitled to reimbursement for taxes paid upon redemption.* It is just and equitable that one buying property at a foreclosure sale should in case of a redemption under an order of court be reimbursed for the amounts paid out for taxes in order to protect the title of the property bought.

6. MORTGAGES, § 715\*—*when claimant of redemption fund properly allowed to appear and answer bill to redeem.* In a bill to redeem land from a sale under foreclosure of a mortgage, no error is committed of which complainant can complain where one not a party to the bill is permitted to appear and answer in order to determine the rights, as between himself and defendant, to the amounts to be paid as a condition of the redemption sought, it appearing that no complaint was made as to the distribution of the redemption fund between the claimants, and that the amount to be paid by complainant as a condition of redemption was not affected by the action of the court in permitting such appearance and answer.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Vogler v. Chicago & Carterville Coal Co., 196 Ill. App. 574.

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**Henry Vogler, Appellee, v. Chicago & Carterville Coal Company, Appellant.**

1. **WATERS AND WATER COURSES, § 29\***—*when evidence sufficient to prove claim of ownership of land.* In an action to recover for injury to land, due to overflow a devise to plaintiff of the fee of the land in question is sufficient prima facie to prove that testator claimed to own the land, it being not necessary to prove such a claim by words.

2. **WATERS AND WATER COURSES, § 27\***—*when person in possession sufficient title to maintain action for damages for overflow.* In an action to recover for injury to land, due to overflow, the possession of plaintiff under a devise of the fee of such land by the will of plaintiff's father is sufficient proof of ownership thereof to maintain the action against one showing no title.

3. **EJECTMENT, § 8\***—*when prior possession under claim of title in fee sufficient to maintain action.* Although strictness in the proof of title is required in actions of ejectment, proof of prior possession by plaintiff claiming title in fee is prima facie evidence of title and seizin, and will enable plaintiff to maintain such an action unless defendant shows a better title.

4. **DEEDS, § 194\***—*when parol evidence admissible to show that deed is release of mortgage.* In an action to recover for an injury to land, due to overflow, where, in order to deny title in plaintiff, defendant offered evidence of a conveyance to plaintiff of only part of such land, held proper for plaintiff to show that the conveyance in question was really a release of a mortgage, plaintiff having borrowed money from the grantor named in such conveyance and given a deed to the land therein conveyed in lieu of a mortgage.

5. **WATERS AND WATER COURSES, § 29\***—*when evidence sufficient to prove title to land.* In an action to recover for injury to land, due to overflow, where plaintiff was in possession under a devise of the fee of such land under the will of his father who claimed title, and where there was no evidence of a better title in any other person, evidence held sufficient prima facie to prove title in plaintiff.

6. **WATERS AND WATER COURSES, § 30\***—*when question for jury whether overflow due to obstruction of sloughs.* In an action to recover for injury to land alleged to be due to the act of defendant in obstructing certain sloughs with debris so as to prevent water from draining off plaintiff's land by means of such sloughs and to cause it to be backed up on such land, where the evidence was conflicting as to whether the obstruction was caused by the

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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construction of a railroad in the vicinity but where there was evidence in some degree tending to show that the overflow was the result of defendant's act, *held* that the question whether the overflow was the result of defendant's act was for the jury.

7. WATERS AND WATER COURSES, § 29\*—*when evidence sufficient to sustain finding that overflow caused by obstruction of slough.* In an action to recover for injury to land alleged to be due to the act of defendant in obstructing certain sloughs with debris so as to prevent water from draining off plaintiff's land by means of such sloughs and to cause it to be backed up on such land, where the evidence was conflicting as to whether such obstruction was caused by the construction of a railroad in the vicinity, but where there was evidence tending to show that the obstruction was caused by defendant's deposits of debris, causing an overflow of water on plaintiff's land, a verdict finding that such overflow was the result of the act of defendant *held* not manifestly against the weight of the evidence.

8. APPEAL AND ERROR, § 1413\*—*when verdict will not be disturbed.* In an action to recover for injury to land alleged to be the result of defendant's act in obstructing drainage so that water was caused to be backed up on plaintiff's land, a verdict for plaintiff will not be disturbed where in a former trial of the action on substantially similar evidence the jury returned a similar verdict.

9. WATERS AND WATER COURSES, § 27\*—*when tenant may sue for injury to crops.* In case of damage to land by overflow, a tenant in possession thereof may recover for crops raised thereon by such tenant alone.

10. WATERS AND WATER COURSES, § 32\*—*what is measure of damages for injury to land in favor of landlord.* In an action by a landlord to recover for injury to land in the possession of a tenant, due to overflow, among the proper elements of damages in such action are the value of any crops raised by him, depreciation in the rental value of the land or of its value as a home, in so far as caused by defendant's wrongful act.

11. WATERS AND WATER COURSES, § 31\*—*when instruction on measure of damages for injury to land due to overflow proper.* In an action to recover for injury to the value of land due to overflow, part of which was in the possession of a tenant, and on which both landlord and tenant had planted crops, and where an instruction was given that in assessing damages the jury should consider the rental value of the land and the discomfort and deprivation of the health, use and comfort of plaintiff's home, caused by defendant's wrongful act, *held* that there was no reason for supposing that the jury assessed as an element of plaintiff's damages the value of any crops planted by the tenant.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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12. **WATERS AND WATER COURSES, § 29\***—*when evidence admissible to show productiveness of soil in action for injury to land due to overflow.* In an action to recover for injury to land by reason of an overflow of water thereon caused by defendant's wrongful act, evidence is competent of the opinion of witnesses as to what the land in question would have produced under a reasonable state of cultivation, its capacity, etc., not as the measure of plaintiff's damages, but as tending to show the productiveness of the soil under reasonable conditions.

13. **WATERS AND WATER COURSES, § 32\***—*what damages recoverable by occupant of land for injury due to overflow.* In an action by the occupant of land to recover for injury thereto as a result of an overflow of water thereon caused by the wrongful act of defendant, plaintiff is entitled to recover for personal annoyance and for being deprived of the comforts and use of his home, as far as caused by the nuisance complained of.

14. **DAMAGES, § 191\***—*when amount to be awarded question for jury.* Where the jury are properly instructed as to the assessment of damages, the amount to be assessed is a question for the jury to be determined by the exercise of their best judgment under all the evidence.

15. **APPEAL AND ERROR, § 1547\***—*when giving of instruction assuming ownership of land in plaintiff not reversible error.* In an action to recover for injury to land, due to overflow, it is not reversible error to give an instruction assuming that plaintiff is the owner of the land injured where there is no evidence in the record contradicting plaintiff's title.

16. **WATERS AND WATER COURSES, § 31\***—*when question of tenancy need not be considered in instructions.* In an action to recover for injury to land, a part of which is in the possession of a tenant, but where there is no evidence that such tenant is in possession of all the land in question, there is no occasion for discussing the question of tenancy in instructions.

17. **WATERS AND WATER COURSES, § 31\***—*when instruction limiting recovery of damages for injury due to overflow to rental value of land covered by water properly refused.* In an action to recover for injury to land by reason of an overflow of water thereon due to defendant's wrongful act, an instruction limiting the recovery in the action to the rental value of the lands actually covered by the overflow, *held* properly refused where the count on which the instruction was based also alleged that by reason of the overflow large quantities of water remained on the land, rendering such land and premises incommodious, unhealthy and unfit for agricultural purposes.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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18. EVIDENCE, § 366\*—*when question improper as calling for conclusion.* In an action to recover for injury to land as a result of an overflow of water thereon alleged to be due to defendant's wrongful act, a witness was asked, what in his judgment was the "reason for this water backing up on Henry Vogler's land." The witness answered: "This refuse that comes from the water has filled up this slash; the water can't get away and backs it up over the farm is all." *Held* no error in permitting the witness to answer, although the question was objectionable as giving witness an opportunity to give a conclusion or an opinion, since the answer stated a fact, and though objectionable as to its latter part, it was not open to the objection made.

19. WATERS AND WATER COURSES, § 32\*—*when damages for injury to land due to overflow not excessive.* In an action to recover for injuries to land as a result of an overflow of water thereon due to defendant's wrongful act, where it appeared that the water discharged was of a deleterious character, and rendered plaintiff's home noisome, uncomfortable and inconvenient, and where there was evidence of a depreciation in the rental value of such land due to defendant's act, a verdict for plaintiff for \$650 *held* not so excessive as to warrant a reversal.

Appeal from the Circuit Court of Williamson county; the Hon. A. W. LEWIS, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed September 1, 1915.

W. A. SCHWARTZ, HOSEA V. FERRELL and DENISON & SPILLER, for appellant.

NEELY, GALLIMORE, COOK & POTTER, for appellee.

MR. PRESIDING JUSTICE McBRIDE delivered the opinion of the court.

The appellee recovered a judgment against appellant for \$650, which it is sought to reverse by this appeal. This case has been tried twice in the Circuit Court and was in this court at the March Term, 1913, and is reported in the case of *Vogler v. Chicago & C. Coal Co.*, 180 Ill. App. 51. At the former trial a verdict and judgment was obtained for \$1,500, which was reversed by this court because in that case damages were claimed and, as we thought, a verdict rendered

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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for a permanent injury to the land, when the appellee was entitled only to recover the rental value and such other damages as injured the premises as to habitation, etc. The evidence as to the nuisance created is substantially the same as on the former trial, except as to the measure of damages, and reference is made to said case for the statement of facts, which will not be so fully repeated here.

The first count of the declaration charges that the appellee was the owner and lawfully possessed of the Southwest Quarter of the Northwest Quarter, Section 18, Township 8, Range 2 East of the Third Principal Meridian, and the Southeast Quarter of the Northeast Quarter of Section 13, Township 8, Range 1 East, which he occupied and enjoyed as a residence and for agricultural purposes, and charges that the defendant wrongfully and unlawfully filled up a branch and natural drain flowing along the southwest corner of the above described premises with slack and waste substance from its mine, and diverted and changed the natural flow of the water that fell on and flowed off of the above described premises into said branch so that said water could not flow off of said lands in the natural way, and that the water that fell on said lands was caused to be and remained standing thereon and thereby rendered the premises incommodious, unhealthy and unfit for occupation and agricultural purposes.

The second count avers that defendant wrongfully and unlawfully pumped water out of its mine and deposited it in large quantities so as to cause plaintiff's premises to overflow and rendered the land unhealthy and unfit for agricultural purposes and occupation as a residence.

The first additional count is, in substance, the same as the first count, except that it contains the further averment that by reason of the wrongful acts aforesaid divers noisome, noxious and offensive vapors, fumes, smells and stenches arose from said standing water on



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the premises aforesaid, and the air through and about the home of plaintiff was thereby greatly filled and impregnated with such noxious and offensive vapors, fumes, smells and stenches and rendered such home unwholesome, uncomfortable and unhealthy, etc.

The second additional count is substantially the same as the second count, except that the wrongful act charged is that they negligently pumped water and refuse out of the said mine and deposited the same upon the premises of plaintiff so the same overflowed, etc.

The third additional count charges that the defendant negligently and injuriously allowed the mine water from its mine and the refuse and filth from its washer to flow to the pond and over the premises of plaintiff and thereby certain filth, slime, mud, refuse, slack and other debris were washed and carried to, upon and over the premises of plaintiff, from which stenches and odors arose, and that said debris and filth was deposited in the wells of plaintiff and the water rendered unwholesome, and the premises and home of the plaintiff rendered unhealthy and unfit for occupation as a home, and for agricultural purposes.

To this declaration the defendant filed a plea of not guilty, and plea of the Five-Years' Statute of Limitations, and a plea denying that the plaintiff was the owner of the property described in the declaration; on which issues were joined.

The first objection raised and argued by appellant for the reversal of this case is that: "Appellee was not the owner of the land." It was shown by appellee that his father devised this land to him in fee, but appellant insists that there was no evidence showing that John Vogler ever claimed to own the land or was in possession. The fact that John Vogler devised this land to his son is proof at least sufficient to make a *prima facie* case that he claimed to own it, as by his will he purported to convey the fee. It was not nec-

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essary to prove this claim by words. This act, in our judgment, coupled with the further fact that appellee was then in possession and has ever since continued in possession of it, is sufficient proof of ownership against one who showed no title whatever. *DeWitt v. Bradbury*, 94 Ill. 446.

Even in cases of ejectment where strictness is required in the proof of title, our Supreme Court has said: “ ‘And it is perfectly well settled, both upon common law authority and by decisions of this court, that in an action of ejectment proof of prior possession by the plaintiff, claiming to be the owner in fee, is prima facie evidence of ownership and seizin, and is sufficient to authorize a recovery unless the defendant shall show a better title.’ And in *Keith v. Keith*, *supra* [104 Ill. 402] it is said: ‘Prior possession alone is evidence of a fee, and although the lowest, until rebutted by a higher it must prevail.’ ” *Coombs v. Hertig*, 162 Ill. 172.

There was no evidence offered by appellant denying the title of appellee except that it appeared from the testimony of appellee that a conveyance had been made to him of a portion of this land by Philip Weinberg in the year 1911, but this was shown to have been in fact a release of a mortgage. Appellee stated that he borrowed \$200 of Weinberg and gave him a deed in place of a mortgage to secure the loan, and this is not disputed. We think it was proper to show the nature of the conveyance and purpose of the deed reconveying the property. In the absence of any evidence tending to show title in any one else other than appellee, we are inclined to think that the evidence offered was at least sufficient to create a prima facie title.

The second objection raised by counsel is that: “ ‘The land in question is naturally low land and it does not overflow now more than it formerly did and any overflows were caused by the construction of the railroads.’ ” While it is true that there was evidence in-

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troduced tending to show the construction of the railroad as claimed may have had some influence upon the flow of the water from this slash, but we think there was also evidence tending to show that the deposits of slack and other debris from the mine of appellant filled up, or tended to fill up, the drainage of these sloughs and tended in some degree to show it filled up the slash so as to cause appellee's land to overflow. To say the least of it, the evidence upon this question was conflicting, and as to whether appellant's acts in creating the deposits claimed did cause the injury to appellee's lands and premises was, as we think, purely a question of fact for the jury, and we cannot say that its finding in this respect was manifestly against the weight of the evidence. It also appears from this record that under substantially the same evidence two juries have determined that appellant's negligent acts caused the injury complained of to appellee's land, and we are not willing to disturb its finding in that respect.

The next objection raised is that the land in question was in possession of a tenant and the right of action for damages to crops was in the tenant and not in Henry Vogler. We do not understand from this evidence that the land in question was in the possession of a tenant, but the evidence shows that appellee himself resided upon this land all the time, and while he kept a man by the name of Parsons, and his wife, in the house he still retained possession and, as he says, rented this land, or a portion of it, from time to time to Parsons, but we do not understand that Parsons was in the exclusive possession of this land at any time. While it is true, as a legal proposition, that for damage done to any crops raised by the tenant the tenant alone would have the right to recover for injuries to such crops, but to such of the crops as the landlord himself may have raised or any damage that may have arisen to him in the depreciation of the rental value of his lands,

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or in its depreciation as a home, would all be proper elements to be considered by the jury in arriving at the damages sustained by appellee; and in determining this the jury were told by the instructions that in ascertaining the damages they should take into consideration the rental value of the land and the injury to the home of plaintiff and the discomfort and deprivation of the health, use and comfort of his home, if any is shown by the evidence.

Henry Vogler did, from time to time, put out crops of his own upon this land and at other times prepared it for crops and was deprived of the planting by reason of the wrongful acts of appellant. We do not believe that under the evidence, and the instructions given by the court as to the damages for which appellee would be entitled to recover, that we would be warranted in saying the jury assessed and gave to appellee any damage for the crops raised by Parsons.

The next complaint is, that the correct measure of damages was the rental value of the land alleged to have been overflowed, or where crops had been destroyed the value thereof, and under this heading complaint is made that some of the witnesses testified as to what the land had produced under a reasonable state of cultivation, its capacity, etc. This evidence, however, was not given or taken as the amount of damages to which appellee was entitled to recover, but was permitted to be introduced as tending to show the productiveness of the soil and what the land had produced under reasonable conditions. As we understand the rule, it was a matter for the jury to determine under all of the circumstances and under proper instructions as to the measure of damages, and what the damages were. In addition to the rental value of the land, appellee was entitled to recover for any personal annoyance and deprivations of the use and comforts of his home, in so far as they were occasioned by the nuisance of which he complains. We think it is well said in

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the case of *N. K. Fairbank Co. v. Bahre*, 112 Ill. App. 292: "The amount in money necessary and proper to compensate appellee is not to be stated by witnesses, nor by the judge who tried the case, nor can it be ascertained by any rule of arithmetic. It must be left to the sound judgment of the jury, under proper instructions, to fix the amount, in view of all the facts and circumstances of the case." We believe that upon the question of the measure of damages the jury were properly instructed, and that the amount of damages was a matter to be determined by them in the exercise of their best judgment under all of the evidence.

Objection is made to the first, seventh and ninth of appellee's instructions, because they assume that the plaintiff is the owner of the land in question. We do not regard this point as well taken, and even if the assumption existed as claimed it would not be any ground for a reversal for there is no evidence in this record contradicting the ownership of this land by appellee, and the giving of such an instruction under the evidence would not be reversible error. *Citizens' Ins. Co. v. Stoddard*, 197 Ill. 330.

The objection to instruction No. 11 has been answered by comment upon the former instructions, except as to the question of tenancy, and we can see no reason why the question of tenancy should be included in this instruction, and none has been pointed out.

It is complained that the court erred in refusing appellant's first refused instruction because it says the instruction is based upon the first count of the declaration and that by this count no damages are claimed to crops or from smells, etc., but only from the overflow of the land. Counsel are mistaken as to the contents of this count of the declaration for it states that by reason of the premises large quantities of water were caused to stand and remain upon the said land, whereby said land and premises had been rendered incommodious, unhealthy and unfit for agricultural

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purposes. The court did right in refusing it because it limited the recovery to the rental value of the land actually covered by the standing water.

Complaint is also made of the court in refusing appellant's third refused instruction. This instruction was properly refused. It was misleading and not based upon the evidence in the case as there is no evidence tending to show that the tenant Parsons was in the exclusive possession of this land and ignores the testimony as to the crops raised by appellee.

Objection made to refused instructions four, five and six have already been answered. As to No. 7, we regard this instruction as being improper and argumentative. While instruction No. 8 might have been properly given, yet we do not think it reversible error to refuse it.

It is insisted that the court committed error in permitting the witness Johnson to be asked the following questions: "Q. What in your judgment, as you know the premises, as you have described, is the reason for this water backing up on Henry Vogler's land?" The question as asked might be criticised as giving the witness an opportunity to give a conclusion or an opinion. The answer to this question is: "A. This refuse that comes from the water has filled up this slash; the water can't get away and backs it up over the farm is all." It appears to us that this answer states a fact that the slash is filled up with refuse that comes from the water and that the water then cannot get away. The latter part of the answer might be subject to criticism but we think it not subject to the criticisms made by counsel.

The other objections made to the testimony, as to what the land had produced, have been considered in the former part of this opinion.

It may be that the verdict is larger than would have been given by the trial judge, or than an arithmetical calculation would establish, but when all the facts are

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taken into consideration, in connection with the noisome, uncomfortable and inconvenient effects that the deleterious waters are claimed to have had upon appellee's home and surroundings, together with the depreciation in the actual rental value of the land from year to year, we are not able to say that the verdict is so excessive as to require a reversal of this case, and the judgment is affirmed.

*Judgment affirmed.*

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### **T. E. Gage, Appellee, v. City of Vienna, Appellant.**

1. TRIAL, § 153\*—*when sufficiency of evidence question for jury.* The question whether the evidence is sufficient to warrant a verdict for plaintiff is for the jury under proper instructions.

2. MUNICIPAL CORPORATIONS, § 1098\*—*when evidence sufficient to sustain verdict.* In an action against a city to recover for personal injuries alleged to have been due to the negligence of defendant in permitting a public street to be obstructed and in a defective condition, where plaintiff's horses ran away and he was thrown from his wagon striking the tongue of a vehicle standing in such street, evidence *held* sufficient to warrant a verdict for plaintiff.

3. MUNICIPAL CORPORATIONS, § 1088\*—*when evidence that other vehicles standing in street at time of accident admissible.* In an action against a city to recover for personal injuries alleged to be due to defendant's negligence in permitting its street to be obstructed and in a defective condition, where plaintiff's horses ran away and plaintiff was thrown from his wagon, striking the tongue of a vehicle standing in such street the admission of evidence that other vehicles were standing in the street in the vicinity of the vehicle whose tongue plaintiff struck, *held* not erroneous, such testimony being competent as showing notice to defendant of the condition of the street, but not as showing other independent acts of negligence.

4. MUNICIPAL CORPORATIONS, § 1098\*—*when evidence sufficient to sustain finding that street is a public street.* In an action against

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.



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a city to recover for personal injuries alleged to be due to the negligence of defendant in permitting its street to be obstructed and in a defective condition, where there was no evidence of a formal platting or dedication of such street as a public street, a finding that such street was a public street *held* warranted, where the evidence showed no dispute as to its character and where there was evidence that it was so called by the witnesses and had been so used, and where it appears that city officials had charge of it and had caused vehicles standing therein to be moved.

5. MUNICIPAL CORPORATIONS, § 971\*—*what is duty of city to keep streets safe.* A city is not bound to keep its streets absolutely safe, and is only bound to use reasonable care to keep such streets in a reasonably safe condition for ordinary travel thereon by persons using due care for their own safety.

6. MUNICIPAL CORPORATIONS, § 971\*—*when instruction as to duty of city as to condition of streets erroneous.* In an action against a city to recover for personal injuries alleged to have been due to the negligence of defendant in permitting its streets to be obstructed and in a defective condition, instructions that it was the duty of defendant to keep its public streets in a reasonably safe condition and reasonably free from obstructions, *held* erroneous as requiring of defendant a degree of care higher than that required by law.

7. MUNICIPAL CORPORATIONS, § 1100\*—*when instruction must contain element of notice.* In an action against a municipal corporation to recover for injuries due to the defective condition of public streets, notice, either actual or constructive, on the part of such municipal corporation of the defective conditions alleged, as being obstructed or out of repair, is one of the essential elements to be proved to enable plaintiff to recover, and an instruction directing such a verdict in such an action must contain such element.

8. INSTRUCTIONS, § 1\*—*when must contain all facts essential to verdict.* Where an instruction directs a particular verdict, if the jury find particular facts, the instruction must embrace all the facts essential to such a verdict, and a failure to do so is fatally erroneous, and cannot be cured by giving other instructions.

9. MUNICIPAL CORPORATIONS, § 1048\*—*when due care must be exercised to avoid injury.* In an action against a city to recover for personal injuries alleged to be due to the negligence of defendant, where the conditions leading up to the injury were set in motion prior to that time, plaintiff is bound to exercise due care as to the manner in which such conditions were so set in motion as well as at the time of the injury, and a failure to do so will bar a recovery.

10. MUNICIPAL CORPORATIONS, § 1100\*—*when instruction as to ex-*

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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*ercise of due care erroneous.* In an action against a city to recover for personal injuries alleged to have been due to the negligence of defendant in permitting its streets to be in a defective and improper condition, where at the time of such injuries plaintiff's horses were running away, instructions that plaintiff, in order to recover, need show that he was in the exercise of due care only at the time of the injury, *held* reversible error, the conditions leading up to the accident having been set in motion prior to the accident.

Appeal from the Circuit Court of Johnson county; the Hon. W. W. CLEMENS, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed September 1, 1915.

G. W. BALLANCE and SPANN & SPANN, for appellant.

O. R. MORGAN, for appellee.

Mr. PRESIDING JUSTICE McBRIDE delivered the opinion of the court.

The appellee recovered a judgment for \$1,000 in the Circuit Court, to reverse which the appellant prosecutes this appeal.

The appellee was injured upon the streets of the City of Vienna on about April 3, 1914, by being thrown from a buggy while traveling upon the streets.

It appears from the evidence that on that morning the appellee drove down in town in what he called his "red mail wagon" and on the way down town the horses tried to run. Appellee secured a new pair of check lines and then hitched the team of horses to an open buggy and again started down town, at which time, as he says, one of the horses was frisky and the other one became frightened and ran away; ran down 6th street, over a crossing and struck the tongue of a wagon that was standing on the side of the street, over next to the building, and the buggy ran upon the wagon in such manner as to throw the appellee to the ground, whereby he was badly injured.

The evidence tends to show that the crossing near

where he was thrown from his buggy was a few inches higher than the level of the ground, and that there was a gradual slope so that at some distance away from the crossing the ground was very much lower than the crossing. The street extends north and south and the wagon was upon the east side of the street, standing north and south with the street, with the tongue turned somewhat into the street, and the point where the wheels struck the tongue was about four or five feet from what is known as the Ferris building. At the distance of about ten feet south of the brick crossing referred to, the street is about two feet lower than the crossing, and the point at which the buggy wheels struck the wagon tongue was some fifteen or eighteen feet from the crossing, and, as some of the witnesses described it, when it struck the tongue it never struck the ground until it went over the wagon.

It also appears from the evidence of some of the witnesses that there was another wagon upon the other side of the street but not directly opposite this wagon, and it appears that from time to time for two or three years back that wagons had stood in and about the sides of this street, and near the livery stable. It also appears that the street was of the width of about sixty feet, and that a space of about thirty feet was kept open for travel. The wagon that was struck by plaintiff's buggy was placed there on the evening before, and the injury to plaintiff occurred in the morning of April 3rd. It appears from the testimony of the witnesses that wagons were often seen upon the side of this street, but not in the traveled portion of the street, and appellant claims that there was sufficient room for the ordinary travel on the street.

There are three counts to the declaration. The first count charges that it was the duty of the defendant to keep and maintain its said streets, street crossings and sidewalks in a safe condition and repair and free from obstructions, and that it knowingly and negligently

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allowed and permitted the said street crossings to be and remain in an unsafe and dangerous condition, and obstructed by wagons, buggies, plows, etc., so that persons traveling along said street were in great danger of their lives and limbs, all of which defendant then had notice. Also that it had suffered and permitted the earth and dirt to wash and wear away from the south side of said street crossing to the depth of two feet, for the space of three years or more, and then avers that while driving along the street and exercising due care and caution that his horses became frightened and unmanageable and ran over said street crossing into and upon a wagon standing upon said street, and he was thereby thrown from his buggy and injured.

The second count charges the same duty and negligence as to permitting wagons and other vehicles to stand in the street, and concludes with the same averment as in the former count.

The third count is the same as the first count, limiting the negligence there charged to permitting the crossing to become and remain out of repair and in a dangerous condition.

It is insisted by counsel for appellant that the evidence in this case is not sufficient to warrant a verdict for the plaintiff. This was a question for the jury to determine under the evidence and proper instructions, and if the jury had been properly directed we would not be inclined to disturb the verdict on that account.

It is also contended that the court erred in admitting evidence of other vehicles and wagons standing in the vicinity of this one. We do not regard the admission of this testimony as erroneous, and while it was not competent for the purpose of showing other independent acts of negligence, yet it was proper and competent for the purpose of showing notice to the defendant of the condition of the street, and we think this doctrine is well sustained by the Supreme Court in the *City of Taylorville v. Stafford*, 196 Ill. 288.

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It is also insisted by counsel for appellant that the street is not shown by the evidence to have been a public street. It is true the evidence does not show a formal platting or dedicating of the street, yet it does appear that it was used as a street, called by all the witnesses a street and described by some of them as extending to the corporate line. The city marshal and street inspector had charge of it and at times prior to this ordered vehicles to be moved, and there is no dispute, so far as the evidence is concerned, that it was a street and we believe the jury were warranted in finding it to be a street. In another trial, however, this may be remedied by more complete proof.

It is next insisted by counsel that the instructions given embodied the idea that it was the duty of the defendant to keep its streets in a safe condition for travel, and that as the city was not an insurer of safety upon its streets that this was a higher duty than was enjoined by the law. Upon examination of the declaration and some of the instructions given by the court on behalf of the plaintiff, we find that the case was tried upon the theory that it was the duty of the defendant to keep its streets in a reasonably safe condition for travel, and reasonably free from obstructions. As we understand the law, the duty enjoined upon the city is to use reasonable care to keep its streets in a reasonably safe condition for travel. This is all that is required of the city. "The city is not bound, under the law, to keep its streets absolutely safe. It is only bound to use reasonable care to keep its streets reasonably safe for ordinary travel thereon by persons using due care and caution for their safety." *Boender v. City of Harvey*, 251 Ill. 228; *Village of Lockport v. Licht*, 221 Ill. 35.

Some of the instructions given on behalf of the plaintiff referred to the declaration for the charges of negligence, and upon examination of the declaration we find that it proceeds upon the theory that it was

the duty of the city to keep its streets in a reasonably safe condition for travel, etc., and while as above stated, the only duty devolving upon the city is to use reasonable care in keeping its streets in a reasonably safe condition, and we think that the instructions requiring that higher degree of care were erroneous.

Complaint is also made of defendant's instruction No. 2, which reads as follows: "The jury are instructed that if they believe from the greater weight of the evidence that the plaintiff, T. E. Gage, suffered injuries as charged in his declaration, that the injuries would not have occurred but for the negligence and want of ordinary care of the defendant, as charged in the declaration, and that the plaintiff at the time of the injury was exercising due care and caution for his own safety, you should find the defendant guilty, and assess the plaintiff's damages, although you may further believe that at the time of the injury the plaintiff's horses were running away and had become unmanageable." It will be observed that this instruction directs a verdict and refers to the declaration for the negligence charged, and the duty and negligence charged in the declaration is of a higher character than required by law. This instruction also omits the elements of notice, either actual or constructive, to the city of the condition of the street. Notice of the condition of the streets upon the part of the city and of the fact that it is obstructed or out of repair is one of the essential things to be proven, and in directing a verdict the instruction must contain the element of notice, either actual or constructive. *Ransom v. City of Belvidere*, 87 Ill. App. 167; *City of Chicago v. Gurrell*, 137 Ill. App. 377.

Where an instruction undertakes to state the facts necessary to be proven to entitle a plaintiff to recover, it must contain all of the material facts, and where an instruction directs a verdict a failure to include all such facts is fatal and cannot be cured by other in-

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Gage v. City of Vienna, 196 Ill. App. 585.

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structions in the case. It has always been held that: "Where a court directs a particular verdict if the jury should find certain facts, the instruction must embrace all the facts and conditions essential to such a verdict." *Illinois Iron & Metal Co. v. Weber*, 196 Ill. 531.

It is also contended that instructions two and three are erroneous in limiting the due care and caution required on the part of the plaintiff to the time of the injury. The evidence in this case discloses that the conditions leading up to the injury were set in motion prior to that time, and such conditions, if carelessly produced by the plaintiff, would bar a recovery, if the plaintiff's team was running away by reason of the carelessness or negligence of the plaintiff, that would be an element to be considered by the jury in determining his due care, and we think that this is the character of case where the due care exercised by the plaintiff must not only extend to the time of the injury but prior thereto as well. The language of these instructions undoubtedly require that the plaintiff should have been in the exercise of due care only at the time of the injury, and the verdict should be for the plaintiff even though the jury may believe that the plaintiff was grossly negligent in starting his team or in permitting them to run away. At least these are the elements that should have been considered by the jury, and we think an instruction of this character is erroneous and condemned in the case of the *Village of Lockport v. Licht*, 221 Ill. 41. The giving of these instructions in the form they were given was error, and of sufficient character to require a reversal of the case.

We do not deem it necessary to comment upon the other objections that are urged to the instructions as those all ready considered are sufficient to require a reversal, and any errors therein may be corrected upon another trial.



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Thompson v. Russell, 196 Ill. App. 593.

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The judgment of the lower court is reversed and the cause remanded.

*Reversed and remanded.*

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**Eugene Thompson, Appellee, v. Harry B. Russell et al.,  
Appellants.**

**(Not to be reported in full.)**

Appeal from the Circuit Court of St. Clair county; the Hon. GEORGE A. CROW, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

**Statement of the Case.**

Action of forcible detainer by Eugene Thompson, plaintiff, against Harry B. Russell and his wife, Mamie Russell, defendants, in the Circuit Court of St. Clair county, to recover possession of a farm in St. Clair county, Illinois. From a judgment of possession in the Circuit Court after appeal from a justice of the peace, defendants appeal.

Plaintiff on December 1, 1911, leased the premises of which possession was sought to be recovered to defendants Harry B. Russell and his wife, Mamie Russell, for a term of three years from March 12, 1912. The lease, in substance, provided *inter alia* that lessees should care for, trim, cultivate and prevent harm to the fruit trees on the farm; should haul free of charge to plaintiff, lime stone or other fertilizer and spread it at points on the farm designated by plaintiff; and grub and chop out as rapidly as possible trees or underbrush from ditches which could otherwise be crossed by machinery.

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Thompson v. Russell, 196 Ill. App. 593.

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Differences arose, and on October 7, 1913, plaintiff served a notice to quit on or before October 18th, A. D. 1913, alleging that defendants had made default, and assigning *inter alia* the following reasons: Failure to work the leased premises set apart as wheat ground for the crop of 1913, in a proper and husbandlike manner; failure to haul to the farm and make distribution of fertilizer material provided by the owner, for distribution on the land during the season of 1913, and failure to distribute said fertilizer material in accordance with written directions of owner; failure and refusal to chop and clear out ditches on the premises of trees and undergrowth; and failure to spread fertilizer material around and cultivate the growing fruit trees on the premises.

Defendants did not deliver up possession of the premises at the expiration of the time named.

At the trial the defendant offered the following instruction as their theory of the issues which was given: The court instructs the jury that the only issues before you for your determination are:

“1st. Whether or not defendants failed to work the portion of the premises set apart for wheat for the season of 1914, in a proper and husbandlike manner; and

“2nd. Whether or not defendants failed to haul and distribute fertilizing material, as provided by the lease; and

“3rd. Whether or not defendants refused or failed to clear and chop underbrush and trees on and along the ditches, according to the lease; and

“4th. Whether or not the defendants refused or failed to spread or throw manure around the trees in the orchard.

“If you believe from the preponderance of all the evidence, that the plaintiff has not shown that the defendants did fail or refuse to do some one or more of the above mentioned things, then you should find the issues in favor of the defendants.”

It appeared that defendant Harry B. Russell was

engaged in business in St. Louis, Missouri, and that he and his wife, Mamie Russell, rented the farm with the intention that the wife and their son, Harry Russell, Jr., eighteen years of age at the time of trial, should manage the farm; that neither the lessees nor their son had had any actual experience in farming prior to the leasing of this farm. After the lease was made, the Russells made the farm their home. Defendant Harry B. Russell continued in St. Louis and the farm was managed by the wife and son. Plaintiff introduced proof tending to show that the wheat ground was not properly prepared in 1913 for the crop of 1914, while there was proof on the part of defendants that the premises set apart for wheat for the season of 1914 were properly cultivated and prepared for the crop. The proof showed without contradiction that plaintiff shipped to defendants for use upon the farm a carload of manure, which defendants failed to haul out to the farm and distribute as provided by the lease; also that plaintiff had to have this fertilizing material hauled to the farm for distribution. The excuse offered by defendants for failure to haul and distribute the manure is that it was provided at a time when it was unreasonable for them to do so, the lease not fixing the time for hauling. The proof further showed that the underbrush and trees along the ditches were not cut or grubbed but there was proof on the part of defendants tending strongly to show that the ditches, even if cleared of trees and undergrowth, would be impassable for farm machinery.

As to whether defendants refused or failed to spread the materials furnished them around the trees in the orchard, the proof of the respective parties did not agree.

WEBB & WEBB, for appellants.

E. W. EGGMANN, for appellee.

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MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

### Abstract of the Decision.

1. **FORCIBLE ENTRY AND DETAINER, § 90\***—*when instruction sufficiently presents issues of fact.* In an action of forcible detainer to recover possession of a farm leased by plaintiff to defendants, on the ground of a breach of the condition thereof, which lease was for a term of three years from March 12, 1912, and required defendants *inter alia* to haul and spread fertilizer furnished by plaintiff for use on the farm, and to remove trees and underbrush from certain ditches, an instruction given at the request of defendants that the jury should find for defendants if plaintiff had not shown by a preponderance of the evidence that defendants (1) "failed to work the portion of the premises set apart for wheat for the season of 1914, in a proper and husbandlike manner;" or (2) "failed to haul and distribute fertilizing material, as provided by the lease;" or (3) "failed to clear and chop underbrush and trees on and along the ditches, according to the lease;" or (4) "refused or failed to spread or throw manure around the trees in the orchard," *held* to present fairly the issues of fact to be determined by the jury under the evidence.

2. **TRIAL, § 225\***—*when jury must adhere to issues.* The jury are bound to adhere to issues presented to them by proper instructions.

3. **TRIAL, § 155\***—*when question for jury presented.* Where the evidence is conflicting the case must be submitted to the determination of the jury.

4. **FORCIBLE ENTRY AND DETAINER, § 84\***—*when evidence sufficient to sustain finding as to breach of lease.* In an action of forcible detainer to recover possession of leased premises on the ground of breach of the condition of the lease by defendants, the lessees, where the evidence was conflicting as to breach, evidence *held* not to warrant an interference with a verdict for plaintiff as being against the preponderance of the evidence.\*

5. **FORCIBLE ENTRY AND DETAINER, § 90\***—*when instruction not erroneous as assuming breach of lease.* In an action of forcible detainer to recover possession of a farm leased by plaintiff to defendants, on the ground of a breach of condition by defendants, an instruction given at the request of defendants that the jury should find for defendants if plaintiff had not shown by a preponderance of the evidence that defendants (1) "failed to work the portion of the premises set apart for wheat for the season of

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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1914, in a proper and husbandlike manner;" or (2) "failed to haul and distribute fertilizing material, as provided by the lease;" or (3) "failed to clear and chop underbrush and trees on and along the ditches, according to the lease;" or (4) "refused or failed to spread or throw manure around the trees in the orchard," *held* to leave the question of defendants' breach to the jury and not to assume that there had been such a breach.

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**James B. Posey, Appellant, v. Commissioners of Highways et al., Appellees.**

**(Not to be reported in full.)**

Appeal from the Circuit Court of Marion county; the Hon. JAMES C. McBRIDE, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

**Statement of the Case.**

Bill by James B. Posey, complainant, against the Commissioners of Highways *et al.*, defendants, in the Circuit Court of Marion county, to restrain defendants from encroaching on complainant's land, and from removing fences and cutting trees along certain roads and also to restrain defendants from prosecuting an action then pending at law. From the decree denying complainant relief prayed for, complainant appeals.

It appeared that complainant owned three tracts of land in Omega township, Marion county, Illinois, being the West Half of the Southeast Quarter of the Northeast Quarter, the West Half of the Northeast Quarter of the Southeast Quarter and the Northwest Quarter of the Southeast Quarter of Section 3. These tracts for convenience are referred to as Nos. 1, 2 and 3 respectively, in the order above named. No. 2 lies directly south of No. 1 and east of No. 3. It also ap-

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peared that this road was first traveled through a wooded country and was not laid out, but was a line of travel not proceeding directly east and west, and having no particular boundaries. After the road had been traveled for thirty or forty years, the highway commissioners in 1897 employed Levi S. Meredith, then county surveyor, to survey and define the east and west road.

Meredith surveyed the road but made a mistake in running the line, but his survey included all parts of the so called line of travel, which was crooked and wandered from side to side of the forty-foot highway located by him. Complainant and others interested were present and acquiesced in the location. In March, 1911, the then highway commissioners caused a new survey by one Warner, then county surveyor, who ignored the Meredith survey, the line of travel, the fences and other evidences of the location of the road, and established the road twenty feet on each side of the half section line, so that at the point of intersection of the roads he fixed the corner of the three lots at a point twelve feet ten inches south and seven feet two inches east of the point where such corner was located by Meredith, and at the west end of the road he marked the corner of complainant's lot No. 3 at a point twenty-four and one-third feet south and fourteen and two-third feet east of the point where such corner was located by Meredith.

There was proof tending to establish the claim of defendants that Meredith was directed to survey the road on the half section line and mark it twenty feet on either side thereof for the highway, and that he attempted to do so but made an error in running the line. There was also proof tending to show that those who acquiesced in this survey of the road at the time it was made by Meredith did so because they thought the half section line correctly located and would not have done so if they had known that the line was not

correctly run on the half section line. Later in the same year that Warner made his survey, he went over it again with Toothacre, another surveyor, to verify it, and the two found the survey substantially correct, making only some minor changes of no material importance. Defendants rely on the Warner survey and are seeking to establish the boundaries of the highway as located thereby, while appellant claims the road as located by the former commissioners, according to the Meredith survey.

The court in the decree appealed from found that the surveyor Meredith located the road in 1897 in the presence of the then highway commissioners and the landowners, setting stakes on the north and south sides of the road, marking its boundaries, and that the road as surveyed and defined by Meredith became and was the highway and road near to and adjacent to the plaintiff's land; that the road as surveyed by Meredith is north of the line of fence which defendants tore down and removed prior to the bringing of this suit; that prior to the removal of the fence on complainant's land south of the road, about the time defendants were beginning to work on the road, complainant pointed out to them, and two other persons, the south line of the road as being along the line of what was afterwards known as the Warner survey, which was the line claimed by said commissioners as the south line of the road in this suit; that complainant was estopped from claiming that the line of the Warner survey was not the south boundary of the road and that he was not entitled to any relief as to the road; and it was decreed that the line of the east and west road was the line of the Warner survey and that the limits of the road were the limits as designated by the survey, and that the road is forty feet in width.

It appeared from all the proofs in the case that it was the intention of Meredith, at the time he made his survey, as it was of Warner later, to ascertain the half



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section line and establish the boundaries of the road twenty feet north and south from such line as a center; that it was the intention of the commissioners at the time Meredith ran this line to lay out the road with boundaries extending twenty feet on each side of the half section line, and that the Meredith survey of the road was for the time asquiesced in, because it was supposed that he had correctly located such half section line. It appeared that some question arose as to the proper location of the road prior to the time the Warner survey was made, and at that time plaintiff went over the road with the commissioners, both at the east end and the west end thereof; that at that time, and also prior thereto, plaintiff cultivated his crops out into the highway and he then pointed out where he thought the line was and told the commissioners that they could grade the road to that line even if it took his crops; that the line so designated was the one which the Warner survey afterwards designated for the true line. The evidence on this point was somewhat confusing, as it referred to different objects along the line of road that are not clearly located.

KAGY & VANDERVORT, for appellant.

CHARLES H. HOLT and W. G. WILSON, for appellees.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

### Abstract of the Decision.

1. ESTOPPEL, § 103\*—*when evidence sufficient to show estoppel by conduct from claiming that line of road as relocated not proper.* On a bill to restrain highway commissioners from encroaching on complainant's land, and from removing fences and cutting down trees along a line of road running through such land, evidence held sufficient to sustain a finding of the chancellor that complain-

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ant was estopped by his conduct from claiming that the line of the road as relocated was not the true line.

2. **ESTOPPEL**, § 60\*—*when property owner estopped to complain as to location of road.* One who has consented to the location of a road through his land cannot be heard to complain when the highway commissioners act on his consent and locate the road.

3. **INJUNCTION**, § 114\*—*when prosecution of action at law should not be restrained.* In a bill to restrain highway commissioners from encroaching on plaintiff's land and from removing fences and cutting down trees along a line of road, *held* improper to restrain defendants from prosecuting a suit at law to recover a penalty in which defendants are entitled to a jury, where the main relief sought in the bill was refused on the ground that complainant was estopped to complain of the acts sought to be restrained.

4. **EQUITY**, § 9\*—*when penalty will not be enforced in equity.* The matters involved in an action at law to recover a penalty where parties are entitled to a jury trial cannot be satisfactorily adjusted in a suit in equity brought to restrain the prosecution of such action.

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**Ellen C. Griffin, Defendant in Error, v. William U. Halbert, Administrator, Plaintiff in Error.**

(Not to be reported in full.)

Error to the Circuit Court of St. Clair county; the Hon. GEORGE A. CROW, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915. *Certiorari* denied by Supreme Court (making opinion final).

**Statement of the Case.**

Petition by Ellen C. Griffin to the Probate Court of St. Clair county for the allowance of a claim against the estate of Sarah Ann Johnson, deceased, intestate, the claim being the principal and interest of a promissory note executed by intestate jointly with her husband, Benjamin Johnson, also deceased, of which note petitioner was the holder. From a decree allowing

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the claim, William U. Halbert, administrator, appealed to the Circuit Court of St. Clair county. To reverse a judgment approving the decree appealed from, the administrator prosecutes this writ of error.

Henry J. Fink, a loan broker in Belleville, Illinois, and as such loaned money on real estate and afterwards sold the securities to investors. As a part of his business he saw that the property securing the loan was insured and received interest from borrowers, and paid it to the holders of the notes. On November 6, 1908, he loaned to Sarah Ann Johnson and her husband, Benjamin Johnson, \$2,800 and took their joint note, due in three years, with interest at the rate of six per cent. payable semiannually and evidenced by six interest notes, for \$84 each, secured by a mortgage on a lot upon which was a dwelling house. The loan was procured for the Johnsons by a contractor who built the house for them. The notes and mortgage were payable to Henry J. Fink, trustee. Shortly after the execution of the notes and mortgage Fink sold and delivered them to Ellen C. Griffin. Thereafter Fink notified Mrs. Johnson a few days before each interest note became due and she paid the interest to him, he in turn paying the same to Mrs. Griffin who delivered the interest note so paid to him, which he sent to Mrs. Johnson. This manner of collection and payment seemed to have continued during the three years. On November 11, 1911, after the principal note had become due, Mrs. Johnson paid Fink \$1,800 on the principal and took his written receipt therefor, the receipt showing that the payment was to be applied on the loan. There is no evidence that Fink had been authorized by Mrs. Griffin to receive said amount on the principal or that Mrs. Johnson knew that the notes had been sold and transferred to her. A month or so after the receipt of this money he informed Mrs. Griffin of the fact and offered her other loans for the amount received, but she refused. She came to Fink's office a number of times about the matter and said she

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wanted the money but did not get it. On August 29, 1912, Mrs. Griffin wrote to Fink, saying she had seen a notice of Mrs. Johnson's death, and further wrote: "You told me they would pay a \$1,000 or more on the mortgage. There is nothing paid and Mrs. Johnson is dead. I want to hear immediately why that estate was not settled and that payment made as you said it would be. If you had looked after it that payment would have been made. That would have cut the mortgage down. That is a heavy mortgage for that house. You hold that \$1,000 for me. Don't let them have it." Other correspondence passed between them in which she demanded \$1,000, which she appears to have thought was the amount paid to Fink, and stating that if it was not paid, she was going to close the mortgage, but he failed to pay her any of the money and finally failed financially and fled the country.

WILLIAM H. PFINGSTEN and JAMES O. MILLER, for plaintiff in error.

TURNER & HOLDER, for defendant in error.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

### Abstract of the Decision.

1. PRINCIPAL AND AGENT, § 132\*—*when person not in possession of note not agent to accept payment of note.* A broker who does not have possession of a note is not made the agent of the holder so as to be authorized to accept payment of part of the principal of the note by the mere fact that such broker sold the holder the note in question, as well as other notes, and has been loaned money by such holder.

2. PRINCIPAL AND AGENT, § 132\*—*when principal bound by act of a third person in receiving payment of note.* In order to bind the holder of a promissory note by a payment of the principal thereof made to one other than the holder, it must appear that the person

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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receiving the payment had either possession of the note or express or implied authority from the holder to receive such payment.

3. **PRINCIPAL AND AGENT, § 132\***—*when duty of person paying note to ascertain authority of third person to accept payment.* The payor of a promissory note is charged with the duty of seeing that the person to whom he makes payment thereof has authority from the holder to receive such payment, if such person has not the note in his possession.

4. **PRINCIPAL AND AGENT, § 132\***—*when evidence insufficient to establish agency to accept payment of note.* On a writ of error to reverse a judgment approving the allowance of a promissory note as a claim against the estate of a decedent, where the note in question was indorsed by the payee to claimant, and where decedent paid to the original payee, a note broker, an amount in part payment of the principal of such note, evidence held to show that in accepting such payment such broker acted as the agent of decedent and not of claimant, it appearing that such broker did not have possession of the note, or express or implied authority from claimant to receive such payment.

5. **PRINCIPAL AND AGENT, § 132\***—*when broker selling note not agent to receive payment.* Where a person purchases notes from a broker and takes from him the notes purchased, the broker is not the agent of such purchaser to receive payment thereon, in the absence of express or implied authority so to act.

6. **PRINCIPAL AND AGENT, § 132\***—*when agent no authority to receive payment of debt.* The collection by an agent of other securities or even of a part of the existing debt is not sufficient to raise an implication of authority in the agent to receive payment of the debt.

7. **PRINCIPAL AND AGENT, § 132\***—*when agent no authority to collect principal of debt.* The fact that an agent has express authority to collect interest on a note is not sufficient to show authority in the agent to collect the principal.

8. **PRINCIPAL AND AGENT, § 183\***—*when evidence insufficient to establish ratification of unauthorized collection of note.* On a writ of error to reverse a judgment approving the allowance of a note as a claim against decedent, where it appeared that decedent gave a note to a note broker, who assigned it to claimant, that claimant retained possession, and that the broker, who had no express or implied authority from such holder to receive payment, received payment of part of the principal and never paid the amount received over to the holder, evidence held insufficient to show a ratification of the payment to such broker.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**William M. Elliott, Appellee, v. Herman Maves, Appellant.****(Not to be reported in full.)**

Appeal from the Circuit Court of Edwards county; the Hon. WILLIAM H. GREEN, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

**Statement of the Case.**

Action by William M. Elliott, plaintiff, against Herman Maves, defendant, in the Circuit Court of Edwards county, to recover a broker's commission for bringing about a contract between defendant and one Naylor, whereby defendant traded his store building and stock of goods for sixty-five acres of land. From a judgment for plaintiff after trial by jury, defendant appeals.

The proofs showed that defendant had a store at Browns, Illinois, and that plaintiff was in the real estate business at Albion, Illinois. Sometime in February following, defendant went to Albion, where he met plaintiff, who testified that at that time defendant asked him to try to effect a trade with Naylor, who had visited the property with Elbert Epler. Plaintiff testified that Epler was induced by him to take Naylor to see the property. Defendant denied that he had the conversation with plaintiff at Albion, but it appeared that immediately after it is claimed to have taken place, plaintiff went with Naylor to an attorney's office and then went out and got defendant and Epler and returned with them to the office; that the terms of the trade were then agreed upon and the attorney instructed to draw up an agreement, which was done, and that while the contract was being drawn, an alteration was made in it for defendant's benefit at the suggestion of plaintiff and the contract was then signed.

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Elliott v. Maves, 196 Ill. App. 605.

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In regard to the contract between defendant and plaintiff concerning the agency for the sale of the land, there was some conflict in the testimony. Plaintiff testified that he contracted with defendant to act as his agent in selling the property and was to receive for his services a commission of two and a half per cent. of the selling or trading price. Defendant testified that his statement to plaintiff was "the party that brings me a deal gets a commission but I reserve the right to make the deal myself provided I can," and claimed to have made the deal himself. A witness, Lovellette, who was present at the time of the making of the oral contract between defendant and plaintiff, corroborated the plaintiff's testimony.

The court modified the following instructions by inserting the word "may" instead of the word "should" therein:

No. 1. "The jury are instructed that if, after considering all the evidence in the case together, you believe that the evidence is equally balanced on both sides, then you may find your verdict for the defendant."

No. 2. "The Court instructs the jury that if you believe from the evidence that Charles Naylor was not induced by the plaintiff to purchase or trade for the property in question by the efforts of the plaintiff, then the plaintiff is not entitled to his commission and you may find your verdict for the defendant."

No. 4. "The Court instructs the jury that unless you believe from a preponderance or greater weight of the evidence in this case that the plaintiff contracted with the defendant to procure a purchase or trade for the property in question, and while acting under said contract procured a purchaser or trader willing and able and ready to purchase or trade for said property, that you may find for the defendant."

No. 5. "You are further instructed that before the plaintiff is entitled to recover in this case he must prove by a preponderance or greater weight of the evidence that the defendant employed him to procure



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a purchase or trade for the property in question, and that the plaintiff in pursuance of said employment found a person and sent him to the defendant, and that said person either purchased or traded for said property, or was willing, ready and able to purchase or trade for said property according to the terms under which the plaintiff was employed to obtain, and unless you so believe from the greater weight of the evidence then you may find for the defendant.”

S. E. QUINDRY, for appellant.

ALLEN E. WALKER and P. C. WALTERS, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

### Abstract of the Decision.

1. PRINCIPAL AND AGENT, § 8\*—*when evidence sufficient to establish agency to exchange land.* In an action to recover a broker's commission for procuring a contract between defendant and another whereby defendant traded his store building and stock of goods for a tract of land, where the evidence was conflicting as to whether defendant made a contract of agency with plaintiff to bring about such exchange, but where plaintiff's testimony was corroborated by that of another witness, evidence *held* sufficient to sustain a finding that such a contract was made.

2. PRINCIPAL AND AGENT, § 83\*—*when evidence sufficient to establish that broker was procuring cause of sale.* In an action to recover a broker's commission for procuring a contract whereby defendant exchanged his store building and stock of goods for a tract of land owned by a certain person, where it appeared that plaintiff went with such person to the office of an attorney, where the contract was made after plaintiff had brought defendant to the same office, evidence *held* to sustain a finding that plaintiff was instrumental in bringing about the exchange.

3. PRINCIPAL AND AGENT, § 69\*—*when agent entitled to recover commissions.* In an action to recover a broker's commission for procuring the exchange of property, where it appeared that defendant requested plaintiff to try to effect such exchange, and

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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where it appeared that plaintiff was instrumental in bringing about such exchange, a verdict for plaintiff for the amount of the commission agreed on *held* proper.

4. INSTRUCTIONS, § 46\*—*when instruction does not invade province of jury.* An instruction that the jury "may" find for a party to an action under certain conditions does not make it mandatory on the jury so to find under such conditions.

5. INSTRUCTIONS, § 162\*—*when modification by insertion of word "may" instead of "should" erroneous.* In an action to recover a broker's commission for procuring the exchange of property, where instructions requested by defendant, to the effect that under certain conditions the jury "should" find in his favor, were modified by the court by substituting the word "may" for the word "should," instructions *held* correct as requested, the words "should" and "may" not having the same meaning as used in the instructions requested.

6. WORDS AND PHRASES—"should" and "may." In some connections the words "should" and "may" have substantially the same meaning.

7. APPEAL AND ERROR, § 1565\*—*when modification of instruction by substituting word "may" for "should" not prejudicial error.* In an action to recover a broker's commission for procuring a contract to be made whereby defendant traded his store building and stock of goods for a tract of land, where instructions requested by defendant that the jury "should" find in his favor under certain named conditions were modified by the court by substituting the word "may" for the word "should" as used in the requested instructions, *held* that the modification was not reversible error, although erroneous as not making it mandatory on the jury to find if they found the conditions named to exist, it appearing that the case was not close on the facts, and that the jury were not misled by the error.

8. APPEAL AND ERROR, § 1538\*—*when instruction omitting essential element not prejudicially erroneous.* In an action to recover a broker's commission for procuring the exchange of property, an instructions state the necessity of such a contract to entitle plaintiff to a verdict, although erroneous as omitting the element of whether there was a contract for commissions between plaintiff and defendant, is not prejudicially erroneous where other instructions state the necessity of such a contract to entitle plaintiff to recover, and where the case is tried on the theory that such contract was essential to recovery.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**W. G. Threewit et al., Plaintiffs in Error, v. W. W. McFall et al., Defendants in Error.**

1. MORTGAGES, § 23\*—*when deed and agreement to recovery constitute single transaction.* In a bill to set aside a deed of real estate absolute on its face and praying to have the same declared a mortgage, and to be allowed to redeem therefrom, where it appeared that an agreement between grantor and grantee was made and recorded at the same time as the deed, whereby grantee agreed to reconvey to grantors the premises conveyed in the deed, free and clear of all incumbrances, on the payment by grantors within two years of certain indebtedness named in such agreement, and already existing, *held* that the deed and agreement constituted a single transaction.

2. MORTGAGES, § 23\*—*when evidence sufficient to show deed intended to secure indebtedness.* In a bill to set aside a deed of real estate absolute on its face and praying to have the same declared a mortgage, and to be allowed to redeem therefrom, where it appeared that an agreement between grantors and grantee was made and recorded at the same time as the deed, whereby grantee agreed to reconvey to grantors the premises conveyed in the deed, free and clear of all incumbrances, on the payment by grantors within two years of certain indebtedness named in such agreement and already existing, evidence *held* to show that the deed was intended to secure the payment of the indebtedness, and not as an absolute conveyance, effectual at once, for a consideration already paid.

3. MORTGAGES, § 23\*—*when agreement to reconvey does not make transaction mortgage.* Where a deed absolute in form is made and accepted as in payment of an antecedent debt and not as security for the repayment of money, an agreement to reconvey in a certain time and for a certain sum does not of itself make the transaction a mortgage.

4. MORTGAGES, § 23\*—*when deed and agreement to reconvey constitute mortgage.* In a bill to redeem, a deed absolute on its face coupled with an agreement to reconvey within two years on payment of certain indebtedness *held* plainly a mortgage within the meaning of Hurd's Rev. St., ch. 95, sec. 12 (J. & A. ¶ 7587), providing that "every deed conveying real estate which shall have been intended only as a security in the nature of a mortgage, though it be by an absolute conveyance in terms, shall be considered

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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as a mortgage," it appearing that such deed was intended as security for the payment of such antecedent indebtedness.

5. JUDGMENT, § 573\*—*when bill may be maintained to enforce against real estate.* The holder of a judgment may within seven years of its rendition maintain a bill in equity to enforce it against the real estate of the debtor situated within the county where the judgment was rendered, notwithstanding the conveyance of the real estate to another, the judgment being a lien on the real estate and being notice to the world of complainant's claim.

6. MORTGAGES, § 28\*—*when rights of grantor and those claiming under him not cut off by refusal of grantee to reconvey.* Where a deed absolute on its face conveys real estate under an agreement made and recorded at the same time as the deed, whereby grantee agrees to reconvey within two years on the performance of certain conditions, the rights of grantors and those claiming under them to redeem are not cut off by a conveyance by grantee to one other than the grantor, where it appears that within such period of redemption grantor or those claiming under him were ready to perform, but grantee refused to accept performance or to reconvey.

7. MORTGAGES, § 28\*—*when subsequent grantees of land under deed not innocent parties in interest.* In a bill to redeem real estate from a deed absolute on its face but coupled with an agreement to reconvey within a named time, the whole transaction constituting a mortgage, where complainants were a judgment creditor of such mortgagors, and a grantee of the equity of redemption under such mortgage, and where some of the defendants were subsequent grantees claiming under the grantee named in the deed from which the redemption is sought, none of such defendants are to be deemed innocent parties in interest where all sources of complainants' title are matters of record.

8. EQUITY, § 146\*—*when bill to redeem from mortgage not multifarious.* A bill to redeem real estate from a deed and agreement to convey constituting a mortgage is not demurrable as being multifarious because one of the complainants joined is an execution creditor of such mortgagor, and the other a grantee of the equity of redemption, although the interests of the complainants are to some extent conflicting, and although one might properly have been joined as a defendant, since both are necessary parties to the bill, and neither can maintain the bill except by overcoming the claims of the defendants to the property sought to be redeemed, to which extent their interests are identical.

9. EQUITY, § 106\*—*when rights of complainants having conflicting interests may be determined.* Where two parties, whose rights are to some extent conflicting, are joined in a bill as complainants,

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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if it be determined that either has a right to equitable relief as against the defendants, the rights of complainants can readily be determined under the bill.

10. EQUITY, § 106\*—*who are proper parties complainant*. Where two complainants in a bill are necessary parties thereto, the fact that one of them might properly have been joined as a defendant is no obstacle in equity to the adjustment of the rights of all parties, including the complainants.

Error to the Circuit Court of Franklin county; the Hon. WILLIAM H. GREEN, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded with directions. Opinion filed December 1, 1915.

T. I. GALLOWAY and R. E. SMITH, for plaintiffs in error.

SPILLER & MILLER, W. F. DILLON and W. P. SEEGER, for defendants in error.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Plaintiffs in error filed a bill in equity against defendants in error, asking the correction of the description in several deeds, and that one certain deed and contract be declared a mortgage, that an accounting be had and that plaintiffs in error be permitted to redeem. A general and special demurrer was sustained to the bill. Plaintiffs in error abided their bill, the same was dismissed for want of equity and judgment was entered against complainants for costs. According to the allegations of the bill, W. W. McFall on or about February 4, 1907, sold and conveyed to Offa Neal for a consideration of \$300, Lot 19, Block D, in McFall's third addition to the City of Benton, Illinois. Neal recorded his deed, entered into possession and improved the lot. On September 13, 1909, W. G. Threewit recovered a judgment against Neal and his wife for \$209.71. At the same time Neal and his wife

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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owed B. P. Flatt, guardian, \$825 as evidenced by their notes dated February 4, 1907, and they also owed the Coal Belt National Bank of Benton \$255.72, as evidenced by their note dated February 18, 1908, and \$304, shown by their note dated March 30, 1908. To secure the payment of said sums and the interest due thereon, on or before two years from April 1, 1910, said Neal and wife, by a deed absolute on its face, conveyed said lot to E. W. Hersh, trustee for said bank, but it is alleged that said deed was intended by the parties thereto as a mortgage only and that upon the payment of said indebtedness and the interest due thereon, said Hersh agreed to reconvey said premises to said Neal and wife clear of all incumbrances made by him as evidenced by his agreement in writing of that date. The deed to said trustee and his agreement to reconvey were both filed for record on March 12, 1910, and duly recorded and copies of the same were filed with and made a part of complainants' bill. The trustee took possession of said premises under said deed and collected rents thereon up to May 17, 1911, amounting to \$175. Prior to said last mentioned date Neal and wife paid all of said indebtedness, except \$825, when the trustee refused to receive further payment. It is further alleged that Neal and his wife and complainants have at all times since May 17, 1911, and are now ready to pay said trustee and the defendants, whatever, if anything, is due them for the principal sums or interest due on said indebtedness, but that said trustee and the other defendants have already refused and still do refuse to accept the same, and refuse to reconvey said premises and claim that said sums of money were paid to said Neal and wife as absolute purchase money for said premises; that said deed was not intended as a mortgage but as an absolute conveyance, and they refused to make an accounting with the complainants concerning the transaction; that on May 10, 1911, said Hersh, trustee, and said McFall labored

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under a mutual mistake that the lot intended to be conveyed was Lot 17 instead of Lot 19, and to correct such supposed error said trustee conveyed Lot 19 to McFall and McFall deeded Lot 17 to said trustee, but that in fact the proper number of the lot was 19; that on May 17, 1911, said trustee sold said premises for \$1,010 to Walter Waggoner and conveyed the same to him as Lot 17 instead of 19. Waggoner, as the bill states, took possession of said Lot 19, however, and collected rents thereon from May 17, 1911, to November 17, 1913, aggregating \$375. On January 20, 1913, Hannah Zwengle purchased said lot from Neal and wife for \$75 and received their quitclaim deed to said Lot 17, which was afterwards corrected by another deed properly describing said property, the last deed having been made after the original bill was filed. On March 14, 1913, Threewit sued out an execution on his judgment and a levy was made and sale had, he being the purchaser. In the certificate of levy, certificate of sale and sheriff's deed, the latter of which was made on July 20, 1914, the property was inadvertently described as Lot 17. On November 17, 1913, Waggoner sold the property to W. W. McFall for \$1,000, making a quitclaim deed therefor and describing the premises as Lot 17. McFall, however, took possession of Lot No. 19 under the deed and retained the same until June 20, 1914, collecting during said time rents amounting to \$105. On June 15, 1914, McFall sold the lot to Fannie H. Newman making a warranty deed of that date, conveying to her said premises by proper description, and she took possession of the same collecting rents therefor, aggregating \$75.

The prayer of the bill is that said instruments wherein said lot is described as No. 17 be corrected to show the proper description; that said deed from Neal and wife to Hersh, as trustee, be decreed to be a mortgage only and complainants be allowed to redeem therefrom on such terms as may be just; that the deed from Hersh, trustee, to McFall dated May 13, 1911,



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and the deed from McFall to Hersh, trustee, due May 10, 1911, be declared null and void; that the judgment in favor of Threewit against Neal and wife be decreed to be the first and prior lien on the premises; that an account of said transactions be taken under the direction of the court and that upon the payment of what may be found due, defendants be decreed to surrender up possession of the property and to convey the same to them by good and sufficient conveyances. The defendants named in the bill are W. W. McFall, Walter Waggoner, E. W. Hersh, trustee, and Fannie H. Newman.

The contract made between Neal and wife and Hersh, made and recorded at the same time as the deed from Neal and wife to Hersh as trustee, for the Coal Belt National Bank of Benton, Illinois, which was made a part of the bill, contained an agreement on the part of Hersh as trustee to reconvey said premises free and clear of all incumbrances by said trustee, upon the payment on or before two years by Neal and his wife of their indebtedness to said bank and said Flatt, guardian, as evidenced by their promissory notes above referred to. The special grounds of demurrer relied on are, first, that it appears from the bill the deed under which complainants claim title to the premises was not executed until since the commencement of this suit; second, that it appears from the contract upon which complainants base their right to redeem that complainants are barred from asserting any rights to said premises; third, that the bill discloses that the premises are now owned by an innocent third party, who has purchased the same for value without notice of the rights of complainants. It is assigned as error by appellants that the court erred in sustaining the demurrer to complainants' bill and in dismissing the bill and rendering judgment against complainants for costs.

The deed from Neal and wife to Hersh as trustee, and the agreement of the latter to reconvey upon the

payment of certain indebtedness, constituted but one transaction, and it appears to us evident that the deed was made to secure the repayment of the money on or before the expiration of two years, and that it was not intended as an absolute conveyance to take effect at once for a consideration already paid. It is true that where a deed that is absolute in form is made and accepted as paying an antecedent debt and not as security for the repayment of the same, an agreement to reconvey in a certain time and for a certain sum does not of itself stamp the transaction as a mortgage. Devlin' on Deeds, sec. 1115; *Pitts v. Cable*, 44 Ill. 103. But the deed and contract plainly bring this transaction within that provision of the statute which provides that "every deed conveying real estate which shall have been intended only as a security in the nature of a mortgage, though it be by an absolute conveyance in terms, shall be considered as a mortgage." Rev. St., chap. 95, sec. 12 (J. & A. ¶ 7587).

The facts in the case as stated in the bill, however, show conditions sustaining the right to equitable relief, even if the deed and contract referred to do not together constitute a mortgage on the premises, because the judgment against Neal and wife in favor of Threewit of September 13, 1909, was a lien on the premises in question and notice to the world. The premises under the agreement of Hersh were to be reconveyed if payment of the debt should be made within two years. Within two years the trustee conveyed the premises to Waggoner, who afterwards conveyed the same to McFall and he to Newman, and before the expiration of the time agreed on it appears from the bill that the proper parties were ready to pay the debt to the trustee and he refused to receive it. The conveyance of the property under these circumstances certainly would not cut off the right to redeem possessed by the Neals or those claiming under them. None of the parties defendant can be held to be innocent parties

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in interest, for the reason that not only the judgment but also the other instruments in writing relied upon by complainants were all matters of record and showed fully the condition of the title to the premises. A point most strongly insisted upon by defendants in error in support of their demurrer to the bill, and to sustain the ruling of the court thereon, is that the bill is multifarious for the reason that the rights of the two plaintiffs in error are inconsistent. There are two parties complainant, one of them, the said W. G. Threewit, claims title to the premises in question by reason of a sheriff's sale to him made under a judgment in his favor against Neal and wife. The other complainant, the said Hannah Zwengle, claims title through the purchase from the Neals of their equity of redemption and the deed conveying the same from them to her. It is true that the interests of the two complainants are to a large extent conflicting, although it is possible that Threewit may have some rights therein, with which the interests of Zwengle would not conflict, and it is also true that either one of these complainants might properly have been made a defendant. Both complainants, however, are necessary parties to the suit, and before either one of them can succeed in establishing his or her rights they must overcome the claims of the defendants to the premises, and to that extent their interests are identical. The first thing to be determined is, whether or not either one of the complainants have a right to equitable relief as against the defendants and, should that question be determined in the affirmative, the rights of the two complainants can readily be adjusted under this bill. Being necessary parties, the fact that one of them might properly have been made a defendant is no obstacle in equity to the adjustment of the rights of all the parties including the two complainants. *Sapp v. Phelps*, 92 Ill. 588.

The order dismissing the bill for want of equity, and entering judgment against complainants for costs, will

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be reversed and the cause remanded with directions to the court below to overrule the demurrer to the bill of complaint, in order that such further proceedings may be had as equity may require.

*Reversed and remanded with directions.*

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**The People of the State of Illinois, Defendant in Error, v. Julius Keyser, Plaintiff in Error.**

**(Not to be reported in full.)**

**Error to the County Court of Wayne county; the Hon. J. V. HEIDINGER, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.**

**Statement of the Case.**

Prosecution by the People of the State of Illinois against Julius Keyser, defendant, in the County Court of Wayne county, charging defendant with wife abandonment. The jury found defendant guilty. To reverse a judgment against defendant for costs, and ordering defendant to pay his wife \$416 in weekly payments of \$8 for the period of fifty-two weeks, defendant prosecutes this writ of error.

It appeared that Julius Keyser and Leonne Shelton were married on September 30, 1911. Winfield Keyser, the father of Julius, owned a farm with a house thereon, in which he lived with his wife and Julius. The father and son operated the farm as partners and, after the marriage, the son brought the wife to the father's home, and she became one of the family, helping the mother in the housework. In the meantime a son had been born, and the wife was soon to become a mother again. Prior to this time, the regard

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of defendant for his wife seems to have waned and at times he refused to speak to her. About October 10, 1913, about a month before her second child was born, he sold his interest to his father for \$800, and taking that money with him, and without arranging for the care of his wife and child, went to the northern part of the State. When his wife asked him where he was going he made no satisfactory answer, and stated he was going to Mexico. The mother of Julius refused to take care of her daughter-in-law during her illness, so she was taken to her own mother, who then lived at Fairfield, where she and her two children have since resided. Defendant remained in the north until Christmas, during which time he neither wrote to his wife, nor sent anything for her support. He afterwards went to Mattoon, Illinois, for a short time and then returned to his father's home, where he has since lived. On one occasion following his return, he came where his wife was living, but said that he came to see his son. Neither at that time nor afterwards did he offer to take his wife back, nor did she offer to return, and during this time she was supported by her parents. At no time while apart did he give her anything, prior to the commencement of this suit. Several months after the suit was commenced he gave her \$1.50, and also furnished a small amount of secondhand clothing for the children.

RICHARD L. BOGGS and CREIGHTON & THOMAS, for plaintiff in error.

H. S. BURGESS and WILLIAM T. BONHAM, for defendant in error; PATRICK J. LUCEY, of counsel.

Mr. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

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**Abstract of the Decision.**

1. HUSBAND AND WIFE, § 274\*—*when evidence sufficient to sustain conviction for abandonment.* In a prosecution charging defendant with a misdemeanor under Hurd's Rev. St., ch. 68, sec. 24 (J. & A. ¶ 3431), providing that "every person who shall without good cause abandon his wife, and neglect and refuse to maintain and provide for her \* \* \* shall be deemed guilty of a misdemeanor," evidence held sufficient to warrant the jury in finding defendant guilty.

2. HUSBAND AND WIFE, § 272\*—*what is nature of proceeding against husband for abandonment.* A proceeding under Hurd's Rev. St., ch. 68, sec. 24 (J. & A. ¶ 3431), providing that "every person who shall without good cause abandon his wife, and neglect and refuse to maintain and provide for her \* \* \* shall be deemed guilty of a misdemeanor," is a criminal proceeding and the amount ordered to be paid by defendant is in the nature of a fine assessed against him, although ordered by the statute to be paid to the wife.

3. HUSBAND AND WIFE, § 272\*—*how amount of penalty for abandonment determined.* The amount of the penalty to be assessed against a defendant in case of conviction of wife abandonment under Hurd's Rev. St., ch. 68, sec. 24 (J. & A. ¶ 3431), and to be paid to the wife as provided by the statute, is to be determined by the rules relating to the imposition of fines and not by those applicable to cases of separate maintenance.

4. HUSBAND AND WIFE, § 272\*—*when amount of penalty for wife abandonment in discretion of court.* The amount of the penalty to be assessed against a defendant in case of conviction of wife abandonment under Hurd's Rev. St., ch. 68, sec. 24 (J. & A. ¶ 3431), must be left somewhat to the discretion of the court.

5. HUSBAND AND WIFE, § 272\*—*when no abuse of discretion of court in fixing penalty for wife abandonment.* Where defendant had been convicted of wife abandonment under Hurd's Rev. St., ch. 68, sec. 24 (J. & A. ¶ 3431), an order that defendant pay his wife \$8 a week for fifty-two weeks held not an abuse of discretion in fixing the penalty provided by such statute, where it appeared that at the time defendant abandoned his wife he had \$800 in money, but made no provision for her, and that during a period of about a year and a half intervening between such abandonment and the trial he paid her \$1.50 and gave her some secondhand clothes for their children, but made no other provision for her.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Grimm v. Lienemann et al., 196 Ill. App. 620.

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**Mrs. George Grimm, Appellee, v. G. H. Lienemann and  
A. B. Rockwell, Appellants.**

**(Not to be reported in full.)**

**Appeal from the Circuit Court of Madison county; the Hon. W. E. HADLEY, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.**

**Statement of the Case.**

Action by Mrs. George Grimm, plaintiff, against G. H. Lienemann and A. B. Rockwell, defendants, in the Circuit Court of Madison county, to recover on a promissory note. From a judgment for plaintiff and against defendants on plea of set-off, defendants appeal. Defendants pleaded partial payment and set-off, and made tender of the balance. Trial by jury was waived. There were no propositions of law or fact submitted.

It appeared that George Grimm, who owned a saloon in New Douglas, Illinois, died in July, 1910, and that the value of the stock and fixtures of the saloon there amounted to between \$600 and \$800. There was little other property, and the stock and fixtures were taken by the widow on her award. On September 6, 1910, George Grimm, Jr., as agent for his mother, sold the stock and fixtures to defendant G. H. Lienemann for his son-in-law, Eph Vinyard. At the time of his death, George Grimm, Sr., owned the Highland Brewing Company \$175, so that it was necessary to get the consent of the company to make a transfer of the property. George Grimm, Jr., Lienemann and Vinyard called upon Eugene Schott, the president of the Brewing Company. Schott drew up an agreement which was signed by Vinyard and Grimm, Jr., the latter acting for his mother:



“September 6th, 1910.

“This agreement entered into between Geo. Grimm and Eph Vinyard, both of New Douglas, Illinois. Geo. Grimm agrees to sell his father's saloon business in New Douglas, Illinois, to Eph Vinyard. And Eph Vinyard agrees to buy Geo. Grimm's saloon business. They both agree that the stock of goods shall be invoiced. Geo. Grimm to select one invoicer and Eph Vinyard to select one invoicer; if these two cannot agree they shall select the third; then all three shall appraise the stock. The furniture of the saloon shall be priced by Eph Vinyard and Geo. Grimm and the price shall be what they will agree upon. Mr. Geo. Grimm promises to pay the Highland Brewing Company \$125 for the note which they hold against his father and Eph Vinyard shall pay the Highland Brewing Co. \$50. Mr. Eph Vinyard agrees to hold out the \$125 of the amount of the invoice which Geo. Grimm agrees to pay the Highland Brewing Company, and Eph Vinyard agrees to pay the \$125 to the Highland Brewing Company's agent, Mr. Peter Watts.

(Signed) EPH VINYARD  
GEO. GRIMM.”

Lienemann then paid the \$50 and the stock was invoiced by two persons selected as agreed.

At the time of the trial both parties who made the invoices were dead and the invoice was not in evidence. There was no evidence of that amount other than the facts and circumstances of the case and the testimony of George Grimm, Jr., Lienemann and Vinyard. The former testified to have written down the articles and added up the amounts at which they were invoiced and that the total was \$777. Lienemann and Vinyard testified that the total was \$652. The note sued on, for \$252, was prepared at the request of Lienemann in the absence of George Grimm, Jr., and signed by Lienemann with A. B. Rockwell as surety. Lienemann also paid Grimm \$400 and afterwards paid the Brewing Company the \$125 provided for in the agreement to be paid by Grimm. Grimm made out and executed for

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Lienemann the following writing, which he called a bill of sale: "This is to certify that G. H. Lienemann has paid \$652 (six hundred and fifty two and 00/100 dollars) as full payment for stock of dram shop goods and fixtures belonging to estate of Geo. Grimm, Sr., deceased.

GEO. GRIMM, Jr.  
MRS. MARY GRIMM,  
per GEO. GRIMM, JR."

GEERS & GEERS, for appellants.

D. H. MUDGE, for appellee.

Mr. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

### Abstract of the Decision.

1. **BILLS AND NOTES, § 440\***—*what constitutes prima facie case.* In an action to recover on a promissory note, plaintiff establishes a prima facie case by proof of the note.

2. **BILLS AND NOTES, § 406\***—*when burden on defendant to establish defense.* Where the plaintiff establishes a prima facie case by proof of a note, the burden of establishing a defense by a preponderance of the evidence is upon defendant.

3. **BILLS AND NOTES, § 440\***—*when evidence sufficient to sustain finding.* In an action to recover on a promissory note, where defendant claimed set-off, and where the evidence as to set-off was conflicting, a finding for plaintiff and against defendant on his plea of set-off *held* sustained by the evidence.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**William M. Sweetser, Appellee, v. Chicago & Alton  
Railroad Company, Appellant.**

1. **COMMERCE, § 5\***—*what law governs duties and responsibilities of interstate carriers.* Since the enactment of the Carmack amendment to the Interstate Commerce Act the law respecting the duties and responsibilities of common carriers of interstate shipments is to be found wholly in the acts of Congress as construed by the Supreme Court of the United States.

2. **COMMERCE, § 5\***—*what is effect of Carmack amendment upon state regulations on liability for interstate shipments.* In enacting the Carmack amendment to the Interstate Commerce Act, Congress manifested a purpose to take possession of the subject of the liability of a railway carrier for loss or damage to an interstate shipment, and all State regulations on the subject, including provisions of State constitutions or laws invalidating contracts limiting the carrier's liability, are thereby superseded.

3. **CARRIERS, § 241\***—*when provision of bill of lading requiring certain notice as prerequisite to recovery sufficient in form.* In an action to recover for alleged negligent damage to a race horse while being transported in interstate commerce, language in the shipping contract providing that recovery for injuries to the property in transit will be barred unless the notice of the injury be given to the carrier within five days after the shipment, *held* plain and certain in meaning.

4. **CARRIERS, § 241\***—*what is object of provision in bill of lading requiring notice of injury to shipment as prerequisite to recovery.* Where a contract for the shipment of live stock contains a provision barring recovery for injury to the live stock transported unless notice of the injury is given to the shipper within a named time, the manifest object of such a provision is to force those claiming to have been damaged by the negligence of the carrier to present their claims promptly for adjustment, while the facts and circumstances on which the claims are based are fresh in the memories of parties and witnesses, and to prevent dishonest claimants from harassing or imposing upon the carrier.

5. **CARRIERS, § 241\***—*when provision in bill of lading limiting time for presentation of claim valid.* A provision in a shipping contract limiting the time within which a claim for damages for injury to live stock may be made, and fixing the manner and place of making it, is valid and binding when voluntarily and understandingly entered into.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Sweetser v. Chicago & A. R. Co., 196 Ill. App. 623.

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6. **CONFLICT OF LAWS, § 21\***—*what law governs validity of provision in contract for interstate shipment limiting time for bringing suit.* Under the Carmack amendment to the Interstate Commerce Act the validity of a provision in a contract of interstate shipment that suit must be brought within a special period is a Federal question to be settled by the general common law, and the question is withdrawn from the operation of State legislation.

7. **CONTRACTS, § 120\***—*when failure of shipper to read contract no defense under Federal law.* Under the Carmack amendment to the Interstate Commerce Act the fact that a shipper of live stock in interstate commerce did not read the contract of shipment at the time of signing it would not under the Federal law relieve him from the binding force of the provisions of the contract.

8. **CARRIERS, § 241\***—*when provision in bill of lading limiting time for notice of injury valid.* The duty required of a shipper by a shipping contract providing that recovery for injury to live stock shipped shall be barred unless notice of the injury is given to the carrier within five days is reasonable, and compliance therewith is not onerous.

9. **CARRIERS, § 241\***—*when failure to give notice of injury to live stock within time limited precludes recovery.* The failure of a shipper of live stock in interstate commerce to comply with a requirement of the shipping contract that notice of injury to the live stock be given to the carrier within five days is fatal to the right to recover for such injury.

10. **APPEAL AND ERROR, § 1802\***—*when remand on reversal unnecessary.* In an action to recover for injury to a race horse in transportation in interstate commerce, where the shipping contract requires that notice of injury be given to the carrier within a named time, the testimony of plaintiff that he failed to comply with such requirement will obviate the necessity of a remand on reversal.

Appeal from the Circuit Court of Madison county, the Hon. WILLIAM E. HADLEY, Judge, presiding. Heard in this court at the March term, 1915. Reversed. Opinion filed December 1, 1915.

C. E. POPE and H. F. DRIEMEYER, for appellant;  
SILAS H. STRAWN, of counsel.

J. V. E. MARSH, for appellee.

Mr. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

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\*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Sweetser v. Chicago & A. R. Co., 196 Ill. App. 623.

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Appellee obtained a judgment against appellant in the Circuit Court of Madison county, for the sum of \$375, on account of injuries to a race horse owned by him. The injuries occurred under the following circumstances:

The race horse called Peter Pan, owned by appellee and in charge of Walter Hutchins, was in a race at Bowling Green, Missouri, but becoming lame was drawn from the race and soon thereafter, on August 8, 1913, was shipped by Hutchins, with two other horses, from that point to Alton, Illinois, over appellant's road. At Godfrey, Illinois, the car containing the horses was set out of the train to be taken to Alton by a switch engine. This engine was carelessly managed in coupling onto the car, so that it struck the same with such force as to knock the horse down and severely injure him, and destroy its value as a race horse, which was shown to have been from \$1,500 to \$2,000 before the injury. At the time the horse was shipped, a shipping contract was prepared by appellant's agent at Bowling Green and signed in duplicate, one copy being kept by the agent and the other delivered to Hutchins, and the freight bill to Alton, amounting to \$19, was paid by Hutchins to the agent. The agent at Bowling Green testified Hutchins asked him the rate and he told him it would be \$19, at a valuation of \$100 each for the horses. Hutchins denies this and states when he applied to the agent the latter put him off until after the passenger train should have passed; that the freight train came in immediately behind the passenger and that he then ran into the depot, called to the agent, who brought the contract to the window where he signed it and ran to his car; that it was then 7:30 p. m., the light was poor and he could hardly see where to put his name; that he made no inquiry about rates and there was nothing said as to the valuation by the agent. The agent stated the time at which the contract was signed was an hour earlier.

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A number of errors are assigned by appellant, but it seeks to reverse the judgment on two principal grounds: One, that the contract and appellant's tariff schedule, duly published and on file with the Interstate Commerce Commission, each provided that at the rate of freight charged appellant's liability was limited to \$100 for any injury to each horse and that therefore the judgment was in excess of appellant's liability. Second, that appellant was not liable for any amount whatever to appellee, because it was provided in section 11 of the contract that if any loss or damage of any kind should occur to the property named in the contract, the shipper should, within five days after the live stock in question had been shipped, give notice in writing of his claim therefor to the railroad company and that in the event of a failure of the shipper to give such notice, he released and should be barred from all claims of any kind or character against said railroad company, arising out of the injury or damage to said stock. Counsel for appellant in their brief contend that this being an interstate shipment, the whole subject-matter of the suit and contract governing the shipment is embraced and governed by the Federal Interstate Commerce Act as amended by the Carmack amendment passed June 29, 1906; and that while the State courts have jurisdiction to try such cases, they must be governed in the trial by said act as amended and Federal decisions construing the same. The authorities cited by appellant support the position assumed by them, and show that by said act and the Carmack amendment, Congress assumed control of the subject of liabilities such as that in question and removed it from the control of the several States. In the case of *Adams Express Co. v. Croninger*, 226 U. S. 491, it is said by the Supreme Court of the United States upon this subject: "Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject. \* \* \* That the legislation supersedes all the regulations and policies of a

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particular State upon the same subject, results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all State regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist. \* \* \* The duty to issue a bill of lading, and the liability thereby assumed, are covered in full; and though there is no reference to the effect upon State regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject." Our Appellate Court has held upon the same subject that: "The law respecting the duties and responsibilities of common carriers of interstate shipments is now to be found wholly in the acts of Congress as construed by the United States Supreme Court; that as declared by that court, Congress has so manifested a purpose in the Carmack amendment to take possession of the subject of the liability of a railway carrier for loss or damage to an interstate shipment as to supersede all State regulation upon the same subject, including the provisions of State constitutions or laws invalidating contracts limiting the carrier's liability." *J. C. Shaffer & Co. v. Chicago, R. I. & P. Ry. Co.*, 185 Ill. App. 615 and *Gamble-Robinson Commission Co. v. Union Pac. R. Co.*, 180 Ill. App. 256. The judgment of the Appellate Court in the case last named was reviewed and affirmed by the Supreme Court in 262 Ill. 400, and it was there said that the Carmack amendment to the



Interstate Commerce Act "superseded all regulations and policies of the different States."

Assuming therefore that the contract of shipment in this case must be governed by the Federal act, we must consider the effect to be given the provisions of this contract thereunder. If appellee is barred in his right of action by his failure to give five days' notice of the injury to his horse, which failure is admitted by him, as provided for by section 11 of the contract, then it would be unnecessary and useless to discuss the question whether appellant is limited in his liability by other provisions of the contract, and for that reason the effect of section 11 should be first determined. The language of this section is plain and its meaning certain, wherein it provides that notice of the injury must be given within five days after the shipment or recovery therefor will be barred. This provision in a shipping contract is not an unusual one, and the validity of similar provisions has been frequently passed upon by State and Federal courts. It is stated in *Black v. Wabash, St. L. & P. Ry. Co.*, 111 Ill. 351: "The manifest object of such a provision is to force those claiming to be damaged by the carrier's negligence, to promptly present their claims for adjustment while the facts and circumstances upon which they are based are fresh in the memories of parties and witnesses, and to prevent being harassed or imposed upon by dishonest claimants."

In *Baltimore & O. S. W. R. Co. v. Ross*, 105 Ill. App. 56, the court holds, for the reasons set forth in the case last above referred to, that such a provision is binding when voluntarily and understandingly entered into; and again in *Baltimore & O. S. W. R. Co. v. Fox*, 113 Ill. App. 180, it is held: "A provision limiting the time within which a claim may be made and fixing the manner and place of making it, is also valid and binding." In *Clegg v. St. Louis & S. F. R. Co.*, 203 Fed. 971, the Federal Circuit Court of Appeals for the

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eighth circuit held a similar provision to be valid, and again in *Missouri, K. & T. Ry. Co. v. Harriman Bros.*, 227 U. S. 657, the Supreme Court of the United States holds that the Carmack amendment had withdrawn the determination of the validity of all stipulations in interstate shipping contracts from State law and legislation under that amendment; and that the validity of a provision that suit must be brought within a special period is a Federal question to be settled by the general common law.

Hutchins testified that he did not read the contract at the time he signed it but, even if he did not do so, this would not now relieve him from the binding force of its provisions under the Federal law. *Atchison, T. & S. F. Ry. Co. v. Robinson*, 233 U. S. 173; *Missouri, K. & T. Ry. Co. v. Harriman Bros.*, *supra*; *Great Northern Ry. Co. v. O'Connor*, 232 U. S. 508, 8 N. C. C. A. 53. And it is to be observed that even if Hutchins did not read the contract at the time he signed it, he had ample time to do so before the expiration of the five days within which it required notice of damage to be given, and he could thereby easily have advised himself of this requirement of the contract. The duty provided for in this regard was not an onerous one, and from what is said in the foregoing authority, and as it appears from a reading of the same, it was a reasonable one and could readily have been complied with by appellee or his agent.

In *Clegg v. St. Louis & S. F. R. Co.*, *supra*, it is said upon this question: "We are clearly of the opinion that the eleventh provision in the contract above quoted, relative to giving notice, was a valid one, and the failure to give the notice fatal to plaintiff's right to recover," and many cases are there cited in support of this doctrine. Appellee or his agent might readily have given the notice of damage to his stock required of him by the contract, and having failed to do so he is, by virtue of the established rules of law above referred to,

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barred from any recovery in this suit. The judgment of the court below will be reversed, and as appellee himself testified that he did not give the required notice, and no recovery can be had in its absence, the case will not be remanded.

*Reversed.*

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